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No. 9392

United States Circuit Court of Appeals

For the Ninth Circuit.

R. J. DUDLEY,

Appellant,

vs.

HENRY A. SCANDRETT, WALTER J. CUMMINGS, and GEORGE I. HAIGHT, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, and CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a corporation,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

COUNSEL

FRANK C. HANLEY,
407 Yeon Building,
Portland, Oregon,
Attorney for Plaintiff and Appellant.

A. N. WHITLOCK,
THOS. H. MAGUIRE and
A. J. LAUGHON,
608 White Building,
Seattle, Washington

ROBT. B. ABEL,
Perkins Building,
Tacoma, Washington,
Attorneys for Defendants and Appellees.

In the District Court of the United States for the Western District of Washington, Southern Division,

No. 8594

R. J. DUDLEY,

Plaintiff,

vs.

HENRY A. SCANDRETT, WALTER J. CUMMINGS, and GEORGE I. HAIGHT, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, and CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a corporation,

Defendants.

COMPLAINT

Plaintiff complains of defendants and for cause of action alleges:

I.

That the above named defendant Chicago, Milwaukee, St. Paul and Pacific Railroad Company was and is a corporation duly organized and existing under the laws of the State of Wisconsin engaged in the operation of a common carrier by railroad in interstate commerce; that the above named defendants, Henry A. Scandrett, Walter J. Cummings and George I. Haight, were duly appointed trustees of the said defendant Chicago, Milwaukee,

St. Paul and Pacific Railroad Company by order duly made and entered about the 17th day of October, 1935, in the District Court of the United States for the Northern District of Illinois, Eastern Division, in certain proceedings therein pending entitled "In proceedings for the re-organization of a railroad" "In the Matter of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, debtor" which was with reference to the re-organization of said railroad company under the laws of the United States and that thereafter and effective as of January 1, 1936, and at all of the times since said date said de- [1*] fendants have been and now are the duly appointed, qualified and acting trustees of said railroad company in charge of and operating all the railroad properties, steam and electric railroad systems and lines, trains, cars, locomotives, tracks and equipment of said railroad company as a common carrier of freight and passengers for hire under and by virtue of their appointment as aforesaid and pursuant to the orders of the aforesaid court and laws governing same.

II.

That on or about the 5th day of October, 1936, plaintiff was in the employ of defendants for hire as a train baggageman and on such date was engaged in the performance of his duties as such in a certain baggage car of defendants' at the station of Tacoma, Washington, which car was a part of train No. 16

*Page numbering appearing at foot of page of original certified Transcript of Record.

of defendants' and destined to Chicago, Illinois, and that plaintiff in the direct prosecution of his duties was arranging space in said baggage car for the reception of train baggage and express matter that was in the process of being shipped and transported in interstate commerce from the State of Washington and into and across the State of Idaho to other States of the United States; that defendants had placed in said baggage car prior to plaintiff reporting for work a certain "smoke jack" which was constructed of galvanized iron one end of which was approximately four feet square and attached to this end was a smoke stack circular in shape about eight inches in diameter and about eight feet long on the top of which was a cross piece of the same material and dimensions attached thereto; that said smoke jack was lying lengthwise in the end of said baggage car and underneath the same was piled other packages of company material and merchandise; that circling the stack of said smoke jack were two flat galvanized iron plates which were loose upon said stack and extended out from the surface thereof a distance of [2] about ten inches; that the edges of same were sharp and likely to cut anyone handling the same, which fact was known to defendants or could have been known by the exercise of reasonable care, but was unknown to plaintiff; that plaintiff in the performance of his duties raised said smoke jack so that the stack thereof was extending upward in said baggage car in the end thereof and

was in the act of moving said packages as aforesaid from underneath the same when said smoke jack started to fall and plaintiff in placing his arm against said jack to keep the same from falling through the negligence of the defendants hereinafter stated came in contact with the sharp edges of said circular galvanized plates and by reason thereof was severely and permanently injured by being cut in the left arm on the wrist bone injuring such bone causing the same to bleed profusely and thereby infecting plaintiff's blood causing systemic blood poisoning throughout his entire system by being infected with what is known as streptococci or other infectious germs, all of which caused a severe arthritic condition of the vertebra of plaintiff's spinal column and plaintiff's right and left arms and the joints of his legs and knees, all of said injuries being permanent and rendering plaintiff incapable of performing any work whatsoever except plaintiff attempted to work between about the 26th day of February and about the 8th day of May, 1937, but was unable to perform the full duties of his work and was compelled to leave said work on or about the date last aforesaid and ever since the receipt of said injuries plaintiff has been and is now suffering continuous and intense pain and mental anguish.

III.

That the aforesaid injuries to plaintiff were caused proximately by the negligence of the defend-

ants in the following particulars: (a) defendants carelessly and negligently failed and neglected to wrap and protect the aforesaid sharp [3] edges of said galvanized circular plates extending from the stack of said smoke jack by covering the same with burlap or other material so that plaintiff and defendants' other employes handling said smoke jack would not come in contact with said sharp edges thereof, which wrapping of said sharp edges of circular plates on smoke jacks when shipping or about to ship same was the custom and practice adopted by and known to defendants; (b) defendants carelessly and negligently failed and neglected to warn plaintiff of the aforesaid dangerous and sharp edges of said galvanized plates on said smoke jack prior to the time that plaintiff was required in the performance of his duties to handle said smoke jack.

IV.

That prior to the receipt of the aforesaid injuries plaintiff was capable of performing his full duties as train baggageman and at the time of said injuries was of the age of about 50 years and had a life in expectancy of 20.91 years and was earning and capable of continuing to earn the sum of at least $190.00 per month or $2280.00 per year, and that since the receipt of said injuries he has been unable to perform any work or labor except as hereinbefore stated, and has lost his time and wages to the date hereof in the sum of $3420.00, and that

plaintiff will always be prevented from performing his usual duties of a train baggageman, or any other remunerative employment, and that by reason of the aforesaid injuries caused by the negligence of the defendants aforesaid, the pain and suffering endured and to be endured by plaintiff and the impairment of plaintiff's earning capacity plaintiff has been generally damaged in the sum of $35000.00.

V.

That the plaintiff herein is and when this action was commenced was a citizen and resident of the State of Washington; [4] that the defendants herein are and when this action was commenced were citizens and residents of the State of Illinois and the State of Wisconsin respectively and there is in this action a controversy which is wholly between citizens of different States which can be fully determined as between them; that the above entitled action is of a civil nature and that the matter and amount in controversy in said action exclusive of interests and costs exceeds the sum of $3000.00.

Wherefore plaintiff demands judgment against the defendants for the sum of $3420.00 special damages and general damages in the sum of $35000.00, and his costs and disbursements herein.

(Sgd) FRANK C. HANLEY
Attorney for plaintiff

State of Oregon
County of Multnomah—ss.

I, R. J. Dudley, being first duly sworn, say that I am the plaintiff in the within entitled action and that the foregoing Complaint is true as I verily believe.

(Sgd) R. J. DUDLEY

Subscribed and sworn to before me this 12th day of April, 1938.

[Seal] (Sgf) F. C. HANLEY
Notary Public for Oregon

My Commission Expires 4/16/40

[Copy Endorsed]: Filed May 21, 1938. [5]

[Title of District Court and Cause.]

ANSWER

The defendants, answering the complaint of the plaintiff,

I.

Admit the allegations contained in paragraph I thereof.

II.

Admit that on the 5th day of October, 1936, plaintiff was in the employ of defendants as train baggageman, and was engaged to perform his duties as such in a certain baggage car of the defendants at the station of Tacoma, Washington, which car was

a part of train No. 16 of defendants' railroad destined to Chicago, Illinois; and admit that plaintiff was in said baggage car as baggageman while said car was standing still on the tracks of defendants at the station of Tacoma, Washington. Admit that defendants had placed in the end of said baggage car prior to plaintiff's reporting for work therein, a certain "smoke jack", and admit that said smoke jack was lying in the end of said baggage car. Admit that plaintiff raised said smoke jack and set it up in said baggage car against the side or end thereof, and admit that said smoke jack started to fall after it had been set up by the plaintiff [6] as aforesaid, and admit that plaintiff's arm or wrist came in contact with said smoke stack after the same started to slip or fall, but deny each and every other matter, allegation and thing contained in paragraph II of said complaint.

III.

Deny each and every matter, allegation and thing contained in paragraph III of said complaint, and deny that the plaintiff sustained or received any injury, and deny that the plaintiff suffered any damage whatsoever, by or on account of any act or omission of these defendants, or any of them.

IV.

Admit that plaintiff was capable of performing his full duties as train baggageman, but deny each and every other allegation, matter and thing con-

tained in paragraph IV of said complaint, and deny that he lost time and wages in the amount of $3420.00, or in any sum whatsoever, by or on account of any act of these defendants, or any of them, and deny that he has been damaged in the sum of $35,000.00, or in any sum whatsoever, by or on account of any negligence of these defendants, or any of them, and deny that the plaintiff has suffered pain, or that he will suffer in the future any pain or any impairment of earning capacity by or on account of any act or omission of these defendants, or any of them.

V.

Admit the allegations contained in paragraph V of said complaint.

Further Answering the Complaint of the plaintiff, and as a First Affirmative Defense thereto, these defendants allege:

I.

That the plaintiff was an experienced baggageman, and [7] had performed the service of baggageman in the employ of the defendants in its baggage cars on and over the lines of the defendant railroad company for more than twenty years prior to October 5, 1936. That the baggage car referred to in the complaint, when plaintiff entered it on October 5th for the performance of his duties as baggageman in connection with the operation of the trains alleged in the complaint, was well lighted and he saw and

could see and did see said smoke stack lying upon the floor in the end of said baggage car, and that no part of said smoke stack was concealed from the view and observation of the plaintiff; and that if he received or sustained any injury by coming in contact with any portion of said smoke stack, that such portion thereof, and all parts thereof, were plain, open and obvious and could have been seen, and the danger of coming in contact therewith was known and fully appreciated, and open and apparent to the plaintiff. That any risk or danger of coming in contact with any portion of said smoke stack while it was in said car was fully known, observed and appreciated, and the risk and danger thereof assumed by the plaintiff in the course of his employment. That said smoke stack was company material for use by the defendants, made at Tacoma, and was placed in said car to be transported and taken from Tacoma as company material to be put upon and installed on one of the cabooses of the company at Spokane, Washington.

For a Further and Second Affirmative Defense to the complaint, these defendants allege:

I.

That the act of the plaintiff in taking up said smoke stack from the place where it was lying on the floor in the [8] end of said car and standing it up against the side or end of said car, was the sole proximate cause of the accident and of the injury

and damage, if any, to the plaintiff resulting therefrom; and that if the plaintiff had left said smoke stack on the floor of the car where it had been placed by the defendant the accident would not have occurred and the plaintiff would not have sustained the injury or the damage resulting therefrom, if any, as alleged in the complaint, or at all.

For a Further and Third Affirmative Defense to the complaint, these defendants allege:

I.

That the accident referred to in the complaint and the injury, if any, resulting to the plaintiff therefrom, and the damage, if any, received and sustained by the plaintiff on account of his coming in contact with said smoke stack, if he did come in contact with the same as alleged in the complaint, or at all, were due to and occasioned solely by the carelessness and negligence of the plaintiff, and that if the plaintiff had used reasonable care and caution in handling said smoke stack and placing it up against the side or end of said car, the accident would not have occurred. That the accident and the injury, if any, resulting therefrom to the plaintiff were occasioned and caused solely by the act of the plaintiff in taking said smoke stack and removing it from a safe place and putting it into the dangerous place and in failing to use due care in the performance of his duty after he had so removed said smoke jack and so placed it, as aforesaid. That

there was no movement of said car whatsoever during the times above referred to, and there was no act whatsoever of the defendants that caused or contributed to the falling or slipping [9] of said smoke stack as alleged in the complaint, or at all; and that the accident and injury therefrom, if any, were caused solely and proximately by the acts of the plaintiff herein before alleged and not otherwise.

Wherefore, defendants having fully answered pray that plaintiff recover nothing by this action, and that said action be dismissed and the said defendants have and recover from plaintiff judgment for their costs and disbursements herein.

(Sgd) A. N. WHITLOCK
(Sgd) THOS. H. MAGUIRE
(Sgd) A. J. LAUGHON
608 White Bldg., Seattle, Wn.
(Sgd) ROBERT B. ABEL
Perkins, Bldg., Tacoma, Wn.
Attorneys for defendants.

State of Washington
County of King—ss.

I, A. J. Laughon, being first duly sworn, depose and say: I am one of the attorneys for the defendants in the above entitled action, and am authorized to make this verification for and on behalf of said defendants. That I am familiar with the facts of

the case, have read the foregoing answer, know the contents thereof and believe the same to be true.

(Sgd) A. J. LAUGHON

Subscribed and sworn to before me this 19 day of July, 1938.

(Sgd) M. C. MUMFORD

Notary Public in and for the State of Washington, residing at Seattle therein.

[Copy Endorsed]: Filed July 20, 1938. [10]

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 8594

R. J. DUDLEY,

Plaintiff,

vs.

HENRY A. SCANDRETT, WALTER J. CUMMINGS, and GEORGE I. HAIGHT, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, and CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a corporation,

Defendants.

JUDGMENT OF DISMISSAL

The above entitled cause of action coming on for trial on the 1st day of August, 1939, before a jury,

and the plaintiff appearing in court and being represented by his attorney, Frank C. Hanley, and the defendants being represented by their attorneys of record, A. J. Laughon and Robert B. Abel, and the jury having been duly empaneled, and plaintiff having presented his evidence, at the conclusion of which, the defendants having moved the court for an involuntary dismissal on the ground that upon the facts and the law the plaintiff had shown no right to relief, and after argument thereon, the court having granted said motion for involuntary dismissal, now therefore, it is,

Ordered, Adjudged, and Decreed, that the above entitled cause of action, by and between R. J. Dudley, plaintiff, and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, defendants, be and [13] the same is hereby dismissed, and the defendants awarded their costs to be taxed.

Done in open court this 8 day of August, 1939.

(Sgd) LEON R. YANKWICH
Judge.

Presented by:

(Sgd) ROBERT B. ABEL
Of Attorneys for Defendants.

Approved as to form:

(Sgd) FRANK C. HANLEY
Attorney for Plaintiff.

[Copy Endorsed]: Filed Aug. 8, 1939. [14]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that R. J. Dudley, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment of the District Court of the United States for the Western District of Washington, Southern Division, entered in this cause in favor of the defendants dismissing the within action, on the 8th day of August, 1939.

(Sgd) FRANK C. HANLEY
Attorney for plaintiff
407 Yeon Building
Portland, Oregon

[Copy Endorsed]: Filed Nov. 3, 1939. [15]

[Title of District Court and Cause.]

* * * * * * *

STATEMENT OF FACTS

* * * * * * *

[16]

R. J. DUDLEY,

The plaintiff herein, having been first duly sworn, testified as follows:

Direct Examination

(By Mr. Hanley)

Q. What is your name, please?

A. Raymond J. Dudley.

(Testimony of R. J. Dudley.)

Q. You are the plaintiff in this action?

A. Yes, sir.

Q. Were you ever in the employ of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company?

A. Yes.

Q. When did you enter their employ?

A. August 4, 1909.

Q. How long did you continue in the employ of the Railway Company?

A. Until May, I think it was around about the 8th or 10th of May?

Q. 19——? A. 1936 or 1937.

Q. What were you first employed as by the Railway Company?

A. As a brakeman, switchman rather.

Q. Where were you employed, Mr. Dudley?

A. In Malden, Washington.

Q. And then, were you ever employed anywhere else on the Railroad Company?

A. I was employed as a brakeman and train baggageman.

Q. From where and to where?

A. Between Malden and Avery, Idaho and between Malden and Tacoma, Washington and between Tacoma and Spokane, and then [22] on some of the branch lines.

Q. How long did you work as a brakeman?

A. About two years, in 1910 and 1911, and then as baggageman for probably about ten or twelve

(Testimony of R. J. Dudley.)

years and then as brakeman, five or six years and the rest of the time as train baggageman.

Q. How long had you been operating as a train baggageman?

A. Probably about twenty years as baggageman and the rest of the time as brakeman and switchman.

Q. In the year 1936 what was your occupation?

A. I was train baggageman.

Q. What was your run?

A. Between Tacoma and Spokane.

Q. Where did you reside at that time, Mr. Dudley? A. At R. F. D. No. 1, Auburn.

Q. Was Tacoma your lay over, you quit your train and laid over here?

A. It is the terminal, yes.

Q. Where did you run to?

A. Tacoma to Spokane.

Q. And how many trips did you make a month, about?

A. A thirty day month, fifteen; a thirty-one day month, sixteen.

Q. That would be round trips?

A. No, that would be single trips.

Q. Each way?

A. About seven and a half average round trips.

Q. What were you doing in October, 1936?

A. Train baggageman.

(Testimony of R. J. Dudley.)

Q. Were you ever injured while in the employ of the Company? A. No. [23]

Q. You mean before October, 1936?

A. No.

Q. Have you suffered any injuries while in the employ of the Company? A. Yes.

Q. When was that? A. October 5, 1936.

Q. What were you doing on that day?

A. I was train baggageman.

Q. Do you know what train you were working on?

A. On train No. 16 between Tacoma and Spokane.

Q. Where did that train operate to? What was the final destination of the train?

A. Chicago.

Q. Did that train and equipment go through from Tacoma, Washington to Chicago, Illinois?

A. Yes.

Q. What kind of a train was it?

A. Passenger train, first class train.

Q. How many cars was the train made up of, if you know?

A. Approximately fourteen they operate nearly every day; I would say fourteen cars.

Q. Was there a baggage car on the front end of the train?

A. The baggage car was on the rear of the train at Tacoma, from Tacoma to Seattle.

(Testimony of R. J. Dudley.)

Q. It was carried on the rear of the train?

A. To Seattle.

Q. What time on October 5, 1936 did you report for work? A. Seven thirty.

Q. What time? A. M. or P. M.? [24]

A. P. M.

Q. What time was the train due to leave Tacoma? A. Eight o'clock.

Q. Why did you report for duty at 7:30?

A. We have to be on duty at 7:30, thirty minutes before leaving time.

Q. Why are you there thirty minutes before leaving time?

A. For the purpose of receiving baggage and Company material.

Q. Your working conditions required you to be there at that time? A. Yes.

Q. What happened then when you reported for duty?

A. I started to work immediately.

Q. What did you do when you got down to the station?

A. I went into the car and started getting the car arranged for receiving baggage.

Q. When you say you entered the car, you mean the baggage car? A. Yes.

Q. Through what door did you enter the car?

A. Through the end door.

(Testimony of R. J. Dudley.)

Q. Was the car combined to any other purpose except to your purpose and the purpose of transportation of train baggage? A. Yes.

Q. Was there anything else in the car?

A. Express was carried in the car, yes.

Q. A part of the car was allotted to express?

A. Yes, about forty-two feet.

Q. How long is the car?

A. Seventy-two feet.

Q. Then about thirty feet was allotted to you? [25]

A. Yes, to me as train baggageman, thirty feet.

Q. That was on one end of the car?

A. Yes.

Q. Was there a door in that thirty feet of the car that you had? A. Yes.

Q. Was there a door on both sides of the car?

A. Yes.

Q. How wide was that door?

A. Five and a half or six feet.

Q. From the door back to the end of the car is how far?

A. About nine feet from the end of the door to the end of the car.

Q. That is when the door is open?

A. Yes, when the door is open.

Q. You mean the door proper or in the opening of the door?

A. When the door is slid back it is probably about nine feet.

(Testimony of R. J. Dudley.)

Q. From the end of the door after it is slid back? A. To the end of the car.

Q. Is there any guards on the interior of the car covering the door? A. Yes.

Q. What do they consist of?

A. Some kind of a metal, steel metal construction shaped kind of round—kind of round.

Q. That is to protect the door from baggage going against the door? A. Yes.

Q. In other words, so you always have free opening of the door at all times whether baggage is up against the door or not? [26] A. Yes.

Q. How is the interior of the car lined?

A. It is painted a dark gray, kind of a dark aluminum color.

Q. It is steel plate lined? A. Yes.

Q. And you say it is a dark aluminum color?

A. Yes.

Q. Is that the color of the entire interior of the baggage car? A. Yes.

Q. What are the lighting facilities of the baggage car?

A. They have lights on the ceiling and one light over the door.

Q. What is the wattage of these lights, the globe wattage?

A. I think they are twenty-five.

Q. How many of them are in the car proper?

A. In the entire car there is about eight through

(Testimony of R. J. Dudley.)

the center and one over the door; four doors, there would be twelve lights.

Q. How high is the interior of the car?

A. About nine feet.

Q. And these lights, the eight lights are up in the center of the car?

A. Right in the center, excepting the ones over the doors.

Q. Now, when you reported for work, was it dark or light; that is, outside?

A. It was dark.

Q. At 7:30? A. Yes.

The Court: What time of the year was it?

A. October 5th.

Mr. Hanley: Q. Was there any lighting on the [27] platform outside, on the depot? A. Yes.

Q. Some lighting there? A. Yes.

Q. The depot, where is that located? That is in the union terminal, is it?

A. No, 25th and A, I think.

Q. 25th and A Streets here in Tacoma?

A. Yes.

Q. That is just a small station? A. Yes.

Q. Was this train standing at that station in Tacoma? A. Yes.

Q. Now, when you got into the baggage car, just tell the jury what, if anything, was piled in front of the door of the car?

A. There was some heavy boxes, a few sacks, gunny sacks with some kind of material in, a

(Testimony of R. J. Dudley.)

smoke-jack and other material I could not describe now.

Q. Were they in the doorway or what part of the car?

A. Some in the doorway and some inside of the car, alongside of the smoke-jack.

Q. Was that the station side that you received the baggage from?

A. I received it from the station side, yes.

Q. What, if anything, did you have to do with this baggage?

A. I had to place it in order; place it so in the car in order that I could receive more baggage.

Q. Was this Company material? A. Yes. [28]

Q. How do you know that?

A. Well, we write it up as such when we made a report of it.

The Court: Mr. Dudley, tell the jury more definitely which of the material was where; in other words, where was this smoke-jack with reference to the other material that you say you had to pick up?

A. It was, some of the boxes and some material was in the door, the door was open, and the jack was alongside of the door.

Q. On what side?

A. On the station side; on the side that the station is on.

(Testimony of R. J. Dudley.)

Q. Was that to your left or the right of your door?

A. It was to the right of the door.

Mr. Hanley: Q. In what direction do the tracks run there; north and south or east and west?

A. North and south, I would say.

Q. This was to the north? A. Yes.

Q. All right; the sacks were where? They were more towards the front?

A. More towards the back.

Q. Was the jack right flush with the wall?

A. Yes.

Q. Right against the wall? A. Yes.

Q. On the floor right next to the wall?

A. It was probably not against the wall but right near the wall.

Q. And the sacks were in front of that?

A. Yes.

Q. Was the jack protruding in a manner so as to obstruct the [29] doorway?

A. That was clear of the doorway.

Mr. Hanley: Q. How far back from the opening of the doorway was the closest end of the jack?

A. Probably about two feet.

Q. And then, toward the doorway how many packages or bundles or boxes of baggage or company material was there located there?

A. Between the door and the jack?

Q. Between the door and in front of the door?

(Testimony of R. J. Dudley.)

A. At the foot of the door I would say there was about eight or ten heavy boxes.

Q. By "heavy boxes", what do you mean?

A. They were something, I could not tell what was inside of them. They were boxes, some of them three feet high and probably eighteen inches wide, and there was some of them two feet high and probably only a foot wide and they were of different size.

Q. That blocked the doorway? A. Yes.

Q. Going back, was there any material between the doorway and the back end? A. Yes.

Q. How many packages there?

A. I would say ten.

Q. From there on and alongside of the jack were there any packages?

A. Yes, small packages.

Q. Where were they?

A. Under the jack and around the jack. [30]

Q. Under the stack part of the jack?

A. Yes.

Q. There were some under the stack part of the jack? A. Yes.

Q. Was there any under the other end of the smoke-jack? A. There might have been.

Q. Can you give an estimate of the number of packages or bundles located in that vicinity?

A. I would say about twelve bundles.

Q. What did you do with reference to these packages, all of them, I mean?

(Testimony of R. J. Dudley.)

A. I was picking them up and looking at them, looking at the destination and placing them in the car where I could find them easily.

Q. What packages did you first touch when you first went to work on them?

A. What packages did I first touch to move them?

Q. Yes? A. I started to move some boxes.

Q. Where were these boxes located?

A. In front of the car door.

Q. Where did you move them to?

A. On the opposite side of the car.

Q. Out of the doorway? A. Yes.

Q. Then, what did you do?

A. I was moving some of the packages around the smoke-jack.

Q. Where did you place those?

A. I placed them in different parts of the car where I knew they would be. [31]

Q. What did you do next?

A. I raised the jack.

Q. What do you mean when you say you raised the jack?

A. The jack—there was some packages underneath the smoke-jack and I raised it to get them out.

Q. Describe the smoke-jack to the jury?

A. It was about seven feet long, and there was a loose disk on the stove pipe part. There was a

(Testimony of R. J. Dudley.)

flange probably eighteen or twenty inches across on the bottom that was loose just below the disk on the pipe.

Q. Mr. Dudley, that is, as I understand, this part of the smoke-jack, is that correct (indicating on smoke-jack)? A. Yes.

Mr. Hanley: Is there any objection to my using this smoke-jack to illustrate it to the jury?

Mr. Laughon: That is what we have it here for. May I make a statement about it?

Mr. Hanley: Yes.

Mr. Laughon: We brought what we had available. I make this statement to show the difference between this smoke-jack and the one being shipped at that time. The jack lying in the car was longer than this jack here. It was going to Spokane to be put on a caboose over there. It was cut down the length of this piece shown here (indicating), it was cut down there and sent out as Company material. In all other respects, the top and the bottom, with the exception of the twenty-two inches in the center here (indicating) it would be the same jack.

Mr. Hanley: We just want to use it to explain to the jury. [32]

Q. Mr. Dudley, what do you call this part of the smoke-jack (indicating)?

A. The smoke pipe or stack part.

The Court: We will call that No. 1 for identification at the present time.

(Testimony of R. J. Dudley.)

Mr. Hanley: Q. What part of the smoke-jack did you call this (indicating)?

A. The stack part.

Q. And this part here (indicating)?

A. The disk or flange.

The Court: Q. What do you call the top?

A. A "T".

Mr. Hanley: Q. And what do you call the lower portion?

A. I would say it was a flange.

Q. And underneath here (indicating), this part, do you know what part that would be?

A. Some protection from the fire.

Q. You don't know what that is termed?

A. No.

Q. Did you ever handle a smoke-jack before?

A. No.

The Court: Q. Did you see them before?

A. Yes, I have seen them on a building or car.

Mr. Hanley: Q. Were any ever shipped before?

A. Not to my recollection.

Q. Now, the smoke-jack that you had in the car, was the pipe part of the smoke-jack about the same dimensions across, I would say about eight inches in diameter, about that? A. Yes. [33]

Q. And this disk here (indicating) that you have described, is that about the width of the disk, about five or six inches, extending out from the stack part? A. Yes.

(Testimony of R. J. Dudley.)

Q. And then this sleeve here (indicating), is that about the same height*h*? A. Yes.

Q. This part the smoke-jack is standing on, is that about the same height*h* from the floor?

A. No.

Q. All right; that jack, what was the height*h* of the bottom?

A. I would say it was about twelve inches or twelve to fifteen inches.

Q. You mean this one was standing up about like that (indicating)? A. Yes.

Q. This disk, the top disk that I am touching here (indicating), was that loose or tight on the pipe? A. It was loose.

Q. How far up would it go, if you know?

A. I would say it was ten or twelve inches higher.

Q. And this big square piece of tin on the base here (indicating), how high was that?

A. About ten or twelve inches from the floor and it was loose too.

Q. Was this also loose? A. Yes.

Q. The edge of this top flange, was that the same as this edge here (indicating)? A. No.

[34]

Q. State what the edge of the flange was?

A. It was straight, flat.

Q. You mean it stuck straight out?

A. Yes.

(Testimony of R. J. Dudley.)

Q. Was the edge of this flange sharp or dull?

A. Very sharp.

Q. When did you get the dimensions description of this smoke-jack that you just described?

A. Shortly after I was injured.

Q. You go ahead and state what happened; you placed this smoke-jack up alongside of the baggage car, then what happened?

The Court: First, before you tell us that, either by picking it up and using the Clerk's desk or over here, indicate how it was lying and what you did with it, describe there what happened to you without hurting yourself again.

Mr. Hanley: Q. The stack part on this jack, how long was this, about; this stack part on the jack?

A. I would say about seven and one-half feet long: the stack was probably five and a half feet long.

Q. And the measurements over all from the "T" at the top to the bottom of the jack was how far? A. About seven and a half feet.

The Court: How tall are you?

A. About five feet eight inches.

The Court: Tell us how it was lying and how you picked it up and what happened to you; just show us with this smoke-jack here?

Mr. Laughon: I might suggest that for the [35] record there ought to be some identification of what counsel is using.

(Testimony of R. J. Dudley.)

Mr. Hanley: Let the record show we are using Exhibit No. 1, which is a smoke-jack, for demonstration purposes.

Mr. Laughon: And that is admitted?

The Court: It has not been offered yet; it is merely for the purpose of illustration. I do not think it is very important to have the exact dimensions. What I want to get before the jury is how the accident happened.

Mr. Hanley: Mr. Dudley, if you will just take this and show to the jury how it laid on the side of the baggage car; first of all, was this disk loose (indicating)? A. Yes.

Q. How loose and how much play did it have?

A. It had all of the play.

Q. What do you mean?

A. It had play for a foot.

Q. Was this bottom piece, disk loose (indicating)? A. Yes.

Q. How much play did it have?

A. It was not so much; it was at an angle, probably forty-five degrees.

Q. This end piece (indicating), how much along there?

A. I would say about ten inches along there.

Q. This part here (indicating)? A. Yes.

The Court: Just tell us what you did with it?

A. There was packages in front of it, and there was packages underneath and around it. I had to

(Testimony of R. J. Dudley.)

move some of those [36] packages, and there was some packages underneath it too. In order to get at the packages I raised it up this way (indicating).

The Court: Did you lean it against the wall?

A. Yes.

Q. You left it there? A. Yes.

Mr. Hanley: Q. How much time elapsed before it fell on you?

A. Probably half a minute.

Q. What were you doing at the time?

A. I was getting these packages out.

Q. Then what happened?

A. It started to move like that (indicating). I thought it was going to move—I am down on the floor getting the packages out from around it—I thought it was moving and put out my arm to stop it and it struck me on the wrist.

Q. Which wrist? A. The left wrist.

Q. Did it cut you? A. Yes.

Q. What part of it cut you?

A. The disk.

Q. How do you know it was the disk?

A. I saw some blood on it.

Q. Did you notice the disk before?

A. No.

Q. Had you made an inspection before you handled it? A. No.

Q. Did you know where it was going? [37]

A. No.

(Testimony of R. J. Dudley.)

Q. How did you find out where it was going?

A. I looked at the tag.

Q. Where was the tag?

A. Tied on the "T" end.

Q. How did you see it was on it?

A. When I raised it up from the floor I saw it and I looked at the tag. I saw the tag up there on the "T" end so I noticed it was going to Spokane.

The Court: At this point we will take a short recess.

Whereupon the Court again admonished the jury to observe the cautions of the Court.

(Short recess)

The Court: Let the record show the jurors are all in the box, all parties present and their counsel.

R. J. DUDLEY,

the plaintiff herein, resuming the stand, testified further as follows:

Direct Examination

(By Mr. Hanley)

Q. Mr. Dudley, were there any other articles besides Company material in the baggage car when you reported for work that [38] you had to take care of? A. Yes.

Q. What was that?

(Testimony of R. J. Dudley.)

A. Laundry bags, linen and mail bags.

Q. When you say mail bags, what do you mean, United States mail?

A. No, Company mail.

Q. Did you have anything to do with Company mail? A. Yes.

Q. Where were these bags located?

A. They were in around the smoke-jack.

Q. How large were they?

A. Probably eighteen inches long and ten inches high.

Q. How many of them? A. Two of them.

Q. Did you have anything to do with the Company mail? A. Yes.

Q. All right, tell the jury what your duty was in connection with that?

A. I have to open these mail bags and sort out all of the mail for all points. Some of it remains here in Tacoma and I have to tie that up and leave it at Tacoma before the train leaves Tacoma; also the mail that goes down on Grays Harbor and the Tacoma Eastern line.

Q. You have to do that before the train leaves Tacoma? A. Oh, yes.

Q. You have how much time to do that in?

A. Thirty minutes.

Q. What did you do with those mail sacks then before you touched the smoke-jack, if you know?

[39]

A. I did not get that.

(Testimony of R. J. Dudley.)

Q. What did you do with those mail sacks before you touched the smoke-jack; did you move them or didn't you? A. Yes.

Q. Where did you move them to?

A. I just moved them in the clear.

Q. When you say "clear", what do you mean?

A. On the floor away from the smoke-jack.

Q. Now, why did you move the smoke-jack?

A. Because there was some material along and around it and underneath it.

Q. Why did you have to move or arrange any of this Company material?

A. Because I had to arrange it in the car so that I knew right where it was and if I had to put it off at a station I could find it right away and would not have to look for it.

Q. Was there any more baggage there available there to be loaded in the car? A. Yes.

Q. How much of it?

A. I could not say how much; there was some on the truck, a truck load.

Q. Where would that baggage be destined to?

A. Whatever comes from Aberdeen and would go to different stations.

Q. Who would that belong to?

A. To some passengers on the train, I presume.

Q. Was it baggage they had checked?

A. Yes.

Q. What was the nature of it? [40]

A. Trunks, grips and suit cases.

(Testimony of R. J. Dudley.)

Q. Who, if anyone, loads that into the baggage car? A. Yes.

Q. I say who, if anyone, loads that into the baggage car?

A. That is the station baggage agent.

Q. They load it into the car and who receives it when it is loaded?

A. That is the train baggage man.

Q. Who is yourself? A. Yes.

Q. What do you do with the train baggage when it comes in?

A. All of the through baggage, that is, Chicago and points East, go in one end of the car.

Q. Is that the end you work in? A. Yes.

Q. When you say "end", is that the extreme end? A. Yes.

Q. Just explain to the jury what you do with it?

A. All of the through baggage goes into the extreme end of the car. What I mean by through, is, Chicago and Eastern points, that is piled in the end of the car, and then local baggage that is not destined that far has to be kept this way so it can be put off at the station to which it belongs.

Q. Did you make any inspection of this smoke-jack before you handled it? A. No.

Q. Why didn't you?

A. I did not have time.

Q. And had you ever shipped any of these smoke-jacks before? [41] A. No.

(Testimony of R. J. Dudley.)

Q. Did you ever handle any in the baggage car?

A. No.

Q. I think you have described that that is not nearly so tall (indicating smoke-jack)?

A. No.

Q. The one you handled was longer?

A. It was quite a bit longer than that.

Q. When the smoke-jack struck your left wrist, I think you testified, did it fall clear over?

A. No.

Q. What happened to it?

A. I just kind of straightened it up.

Q. How big was the cut on your wrist?

A. It was in to the bone.

Q. Was there any blood? A. Yes.

Q. What was the color of the smoke-jack?

A. Kind of a galvanized color, kind of dark gray.

The Court: The regular color of galvanized iron? A. Yes.

Mr. Hanley: Q. How did that compare with the color of the interior of the car?

A. As far as I could tell, about the same.

Q. What was the lighting condition of the car?

A. They were poor.

The Court: They were the same as they had been there, weren't they?

A. Yes, the lights were burning. [42]

Mr. Hanley: Q. To what extent were they burning; were they burning full? A. No.

(Testimony of R. J. Dudley.)

Q. How did you determine that? To what extent were they burning?

A. I would say about, probably about one-third capacity.

Q. What is the difference when you are standing; what are the lights lighted from?

A. They are lighted when the train is standing, they are lighted—current is supplied from a storage battery.

Q. Describe the lighting when the train is running?

A. Underneath the baggage car, and when the train is running the current is supplied by an axel dynamo generator underneath the car.

Q. Is that on each individual car?

A. Yes.

Q. Then, when the train is running, how much brighter is the lights than on this night in question when it was standing at the station?

A. Very much brighter when the train is running.

The Court: The light you had there is the usual light you had there when you are working there, was it? A. Yes.

Mr. Hanley: Q. These lights, you said, were burning about one-third of capacity; now, is that the amount of lighting you always have in the car or were they sometimes brighter?

A. They were brighter sometimes.

(Testimony of R. J. Dudley.)

Q. Is it the usual thing for them to be brighter by the station when you are standing there and they are loading [43] the baggage; they have lights at the station where you are loading the baggage?

A. Yes, certainly.

Q. How much more lighting does that give you right by the door of the baggage car?

A. Probably about—not full at any time but probably, maybe a third more right by the door.

The Court: You saw the packages, you saw what you were moving. You saw the packages and the smoke-jack, you stood it up; you were not in the dark at any time, were you? A. No, sir.

Q. You did not have to grope for anything, did you? A. No, sir.

Q. You knew what the object was?

A. Yes, sir.

Q. You had light enough for that?

A. Yes, sir.

Mr. Hanley: Q. Did you have light enough to read the tag? A. No, sir.

Q. What did you do to read the tag?

A. I raised it up near the lights so I could see where the destination was; where it was going.

Q. You saw the objects, the outlines of the objects themselves, is that correct?

Mr. Laughon: I object to that question as leading. Let the witness state what he saw. I object to counsel's last question as leading.

The Court: Objection sustained. [44]

(Testimony of R. J. Dudley.)

The Court: Q. When you stood it up you saw its contour and you saw the parts that made it up?

A. Yes, sir.

Q. You stood it up because you wanted it out of the way? A. Yes, sir.

Q. That occurred long after you had looked at the tag? A. The accident?

Q. When you stood it up? A. Yes, sir.

Q. Then you went about your work?

A. Yes, sir.

Q. You testified you raised it up; you stood it up, did you? A. Yes, sir.

Q. Then you stooped down to do some other work? A. Yes.

Q. And in about half a minute it fell?

A. Yes.

Q. Getting back to the accident, then, after about half a minute it fell towards you and you put out your left arm to put it to rest, to stop it, and it cut you? A. Yes.

Q. All of this time that this happened you were stooping? A. Yes.

Q. You could see what the object was in front of you? A. Yes.

Mr. Hanley: Q. Now, the tag, I understood from your answer to the Court's questions that you stood the jack up after you read the tag; did you read the tag before you stood it up or did you read the tag at the time you set it up; when did you

(Testimony of R. J. Dudley.)

read the tag as to the [45] destination? When was that?

A. When I raised it up, I raised it off the floor and the "T" had the tag on it and with the "T" near the lights I looked at the tag and then raised it up against the side.

Q. When did you first see the disks?

A. After my arm was cut.

Q. Was there any packages piled over the jack?

A. Yes.

Q. And on top of it? A. Yes.

Q. Before you raised it up? A. Yes.

Q. What did you do with those packages?

A. I just cleared the jack, just took them off the jack and laid them on the floor, back on the floor.

Q. Now, after you were cut, Mr. Dudley, what did you do?

A. I showed the conductor my arm and told him I was cut.

Q. Who was the train conductor?

A. W. S. Johnson.

Q. Was your arm bleeding at that time?

A. Yes.

Q. To what extent?

A. It was bleeding quite freely.

Q. Did you tie it up; was there anything done with it at that time? A. Yes.

Q. Tell the jury what happened from there on?

(Testimony of R. J. Dudley.)

A. The conductor left immediately for the train passengers office to get a man to relieve me. The express man gave me first aid, tied it up, bandaged it up and after he had [46] bandaged it up and looked at the jack, shortly after that the conductor came back and told me I was relieved and then I went to the passenger office and called up the doctor.

Q. Who was the doctor?

A. Dr. Leaverton.

Q. What capacity does he serve with the Railroad?

A. He is the Milwaukee doctor, the Hospital Association doctor.

Q. What do you mean "Hospital Association doctor"?

A. He treats employees that belong to the Milwaukee Hospital Association.

Q. Were you a member of the Milwaukee Hospital Association? A. Yes.

Q. For that, what, if anything, did you pay to the Association?

A. I don't know just exactly; they take it out of our wages. I think it is about $2.00 a month.

Q. Go ahead and explain to the jury what you did then?

A. I went immediately to Dr. Leaverton's home and he examined my arm and said he would have to sew it. He got his medicine and gut and took

(Testimony of R. J. Dudley.)

some stitches in there, I would not say for sure how many but I think it was three or four, and he told me to wait awhile. I sat down for awhile and it did not want to stop bleeding so he unbandaged it and took, I think, one more stitch in it and told me to remain awhile longer. It did finally stop bleeding and he told me I could go home but to be back in his office the next day. I went home and went to bed. The next morning I got terribly sick, some terrible feeling in my arm was paining me bad and I was taken to the doctor, Dr. Leaverton, who treated me the night before. I am not positive whether he took the stitches out the next morning or the following [47] morning. He put my arm in a hot solution in a tank of some kind for about an hour and a half and then he told me to return the following morning. I did that, return every day, excepting Sunday, for probably, about four weeks; Sundays I had instructions to be treated at home with hot water and some solution. And then he said "we are going to try to get away from putting your arm in this solution and we won't give you that treatment today, but however, you be back tomorrow" and he would paint it with some kind of medicine or salve and bandage it. The arm was draining very freely; he would place a large amount of cotton on my wrist and before I would get home it would be draining out from the bandages. He gave me that treatment for probably a week and

(Testimony of R. J. Dudley.)

told me that he had it stopped draining, but however, he told me to come every other day. It stopped draining about the third day and after it stopped draining I told the Doctor that it was paining me terribly again but he did not comment on it. He told me to be back there the following day or the next day and when I returned I told him that the arm is not right, it is simply paining me terribly. About the following time, probably the next or second day, I told him the same thing, that the arm was not right and that it was paining me terribly.

Q. How many times did you go to this Doctor, the Hospital Association doctor, Dr. Leaverton; how many times did he treat you?

A. I would say probably sixty trips.

Q. And that treatment continued from the time you were injured up until what date, about? [48]

A. Probably sometime in July or August, 1937.

Q. When did you return to work?

A. Along the latter part of February.

Q. That would be the following February, 1937?

A. Yes.

Q. How long did you continue to work?

A. About the eighth or tenth of May.

Q. Of 1937? A. Yes.

Q. What was your condition during the period of time you worked, your physical condition during that period of time?

(Testimony of R. J. Dudley.)

A. I was terribly in pain.

Q. Where did you have the pain?

A. Especially in my right arm and both knees.

Q. At the joints? A. Yes.

Q. Where else?

A. In my back and my left shoulder.

Q. How did you happen to go to work?

A. I was sent to Dr. Bouffeleur who is the Chief Surgeon of the Milwaukee and I asked him to authorize some money or some expenditure to be examined——

Q. Did he advise you to go to work?

A. Dr. Bouffeleur, yes.

Q. He is the Chief Surgeon for the Hospital Association? A. Yes.

Q. You went to work on his advice?

A. Yes.

Q. You worked from February to May 8th?

A. Yes. [49]

Q. How did you perform your work during that period of time? A. Yes.

Q. Did you do your full duties during that period of time? A. Yes.

Q. Did it affect you doing that work?

A. Yes.

Q. In the knees? A. Yes.

Q. Then, why did you quit work on May 8th or 10th, 1937?

A. Because my arm was paining me so bad.

(Testimony of R. J. Dudley.)

Q. Which arm? A. My right arm.

Q. You were cut on the left arm? A. Yes.

Q. Where did you have this pain in the right arm? A. Just above the elbow.

Q. Was it normal all of the time, the external appearance of your arm? A. No.

Q. What was the condition of it?

A. About the first or second trip after I went to work my right ankle and my right thumb started swelling up. I got swelling in my left hand and my knees got so bad I was kind of wabbly on my feet.

Q. Were your knees swollen? A. Yes.

Q. Would they stay swollen all of the time?

A. No.

Q. Would you be better at times than others?

A. Yes. [50]

Q. The pain was where?

A. In my right arm and knees.

Q. Was there any in the left arm?

A. Not at that time.

Q. Any in the back?

A. Later it came in the back.

Q. Now, let me get back, diversifying a little while I have it in mind. Had the Company, prior to the time you were injured, ever shipped any tools in your baggage car? A. Yes.

Q. What kind.

A. Cross-cut saws, axes and adzes.

(Testimony of R. J. Dudley.)

Q. What, if any, protection was placed on the sharp ends of the adzes?

A. They usually had, I think, a burlap wrapping around that.

Q. Would the points be protected?

A. Yes.

Q. In what way?

A. They usually had some protection of some light wood over it.

Q. Would the sharp ends be exposed under any circumstances? A. No.

Q. Did the Company always ship that kind of sharp tools with that protection, all shipments which you had prior to the time of the accident?

A. Yes.

Mr. Laughon: I object to that, your Honor, as immaterial; that is not proof of anything in this case. There is no allegation in the complaint alleging this was a sharp edged tool like a saw or adze. [50]

The Court: I do not think this could be called a sharp edged tool. If the accident had occurred by a man walking against it in the dark the question might arise but I cannot see how the question could arise here where the accident occurred when an attempt was made to stand it up and it fell. Almost any heavy object, if falling from any height*h* and sufficient force, would necessarily cut. There is no showing here that this was a cutting edge.

(Testimony of R. J. Dudley.)

Mr. Hanley: I thought I covered that, your Honor. He has not identified this as being the same edge as an axe or saw at all, but he has testified that this disk extended out and that it was and did constitute a sharp edge and that that was the thing that cut his hand. I would like to turn to the record and have that part of it read to your Honor.

The Court: I think that entire testimony, I will strike out any testimony in regard to the sharp edges of axes, adzes and saws until you show this was as sharp as an axe, adze or saw.

Mr. Hanley: I thought I covered that, your Honor.

The Court: Until it is shown what kind of an edge it was, I will strike that part of the testimony. Ladies and gentlemen of the jury, the testimony concerning the shipping of axes, adzes and saws and protection of the sharp edges will be stricken and you will disregard it as though it had not been given.

Mr. Hanley: Q. This top disk that I am pointing to, will you describe just what that was; first, tell me, when did you first examine that disk? [51]

A. Shortly after it cut me.

Q. What attracted your attention toward it?

A. After I had had first aid I examined the jack and noticed that there was some blood on the disk part of the jack.

Q. Describe what type of edge there was on the disk?

(Testimony of R. J. Dudley.)

A. It was a flat disk and I saw it was a loose disk.

Q. What kind of an edge did it have?

A. It had a very sharp edge.

The Court: What do you mean "a very sharp edge"?

Mr. Hanley: Q. Is there anything here that you could compare it with?

A. It was very sharp; it was so sharp you could cut yourself if you practically touched it.

Q. Was it falling when you came in contact with it?

A. It just started slipping and I put my arm out to keep it from falling on me and it struck me.

The Court: That was made of corrugated iron?

A. Yes.

Mr. Hanley: Q. Have you ever cut corrugated iron with one of those heavy tin snips?

A. Yes.

Q. Cutting cans and things like that?

A. Yes.

Q. When you cut corrugated iron it leaves an edge? A. Yes.

Q. Now, tell us, how would an edge of that type caused by merely cutting the edges compare with the edge that was on that jack; was it the same or had it been chiseled off to a sharp point like the point of a knife? [52]

A. It was not like that; it was flat; it was not as heavy as this (indicating on smoke-jack). It had the raw edge on it.

(Testimony of R. J. Dudley.)

The Court: Q. Take this small pocket knife; this one is flat as though it had been cut off sharp and you see it shows a sharpening of the edge?

A. Yes.

Q. All right; what kind of edge did the disk have?

A. It had a sharp edge like that knife.

The Court: All right; go ahead.

Mr. Hanley: Q. Was there any covering on it at all? A. No.

Q. Now, I will ask the question, were sharp tools ever shipped in your baggage car?

A. Yes.

Mr. Laughon: I object; he answered before I could object, your Honor.

The Court: I am not going to allow any evidence as to any instruments except as to this type. If you desire to submit instructions to the jury with reference to a sharp edge, that something of that character should have been protected, they may be submitted with a proper instruction, but to compare this with an axe, knife or saw is not warranted by the facts because we are dealing with an instrumentality which is entirely different in manufacture and to say any article composed of something like sheet metal or corrugated iron and the comparison both as to size and type and the place where it was is not proper, the more so as the accident did not occur by the person [53] stepping on it but in at-

(Testimony of R. J. Dudley.)

tempting to make it stand up or lean against the wall of the baggage car.

Mr. Hanley: An exception, if the Court please.

The Court: No exceptions are necessary under the new rules. There is only one exception left and that is exceptions to the Court's instructions to the jury.

Mr. Hanley: Q. Was there any covering of any kind on this disk? A. No.

Q. Now, had you received any notice from the Milwaukee or any of its agents or employees of the sharp edge being on this smoke-jack you have just testified about? A. No.

Mr. Laughon: I object to that as immaterial.

The Court: Objection overruled.

Q. Now, after you quit work in May, 1937, will you describe to the jury what your condition has been from that time up to the present time, your physical condition?

A. I went to Dr. Leaverton and complained about my knee and he taped it over tight and told me to be back in a week and then I was treating by Dr. Long.

Q. Who is Dr. Long; what is his initials or full name? A. Dr. L. Dudley Long.

Q. Dr. L. Dudley Long? A. Yes.

Q. Where is he located? A. Seattle.

Q. How frequently did he treat you?

(Testimony of R. J. Dudley.)

A. Probably, sometimes every four or five days, sometimes twice a month and sometimes three or four times a month. [54]

Q. Has Dr. Long been treating you during all of that period of time up to the present time?

A. Yes.

Q. What has been your physical condition?

A. I have been in bed on account of the pain in my spine.

Q. What part of your spine?

A. From here (indicating) down, about half way down.

The Court: Q. From the small of the back?

A. Yes, and in my left shoulder, both arms from my elbows down and both knees.

Mr. Hanley: Q. Do you have pain in them?

A. Yes.

Q. What type of pain, could you describe the degree of pain?

A. Just an aching, an aching pain.

Q. Does it interfere in any way with your sleep? A. Yes.

Q. To what extent?

A. If I rest I sleep very good but if I try to do something, try to exert myself, I do not sleep so good.

Q. Are you able to do any work?

A. No.

Q. Have you done any physical labor since you have left the Railway? A. No.

(Testimony of R. J. Dudley.)

Q. None, Mr. Dudley, did you do, or do you do any work around the house, any chores of any kind? A. No.

Q. Are you able to do any? A. No.

Q. How do you know? [55]

A. Because I have tried several times.

Q. What kind of work would you try?

A. I tried to do some painting and I tried to seed some oats on my place where I was living; I tried to harrow and I tried to continue my turkey farm that I was operating, tried to work on the turkey farm.

The Court: Q. With what result?

A. The result is that I would have—that the pain would get so severe I would have to quit.

The Court: At this time we will take our noon recess. Court will reconvene at Two o'clock.

Whereupon the Court again admonished the jury to observe the cautions of the Court and Court was adjourned to reconvene at Two o'clock P. M., of this date.

(Noon recess) [56]

Afternoon Session

Court reconvened at Two o'clock P. M. of this date pursuant to adjournment.

The Court: Let the record show that all twelve jurors are present and also both parties and their counsel.

R. J. DUDLEY,

the plaintiff herein, heretofore called and sworn, resumed the stand and testified further as follows:

Direct Examination

(By Mr. Hanley)

Q. Mr. Dudley, as a result of the physical condition you have described, did you spend any time in bed? A. Yes.

Q. Tell the jury how much time, approximately; how much time you spent in bed between the time you were injured up to the present time?

A. Possibly about three months with my spine; possibly about five months with my knees and at different times with my arms and knees and spine.

Q. Where were you in bed, at home or the hospital?

A. I spent probably five months at home and at different times two months at 9515 Rainier Avenue in Seattle and I have been in bed at different times, probably a day or two at William Skagen's at Kent and I spent two days in surgery, Cobb Building Surgery in Seattle.

Q. Were you operated on for any ailment or anything since [57] this accident happened to you?

A. Yes.

Q. State briefly what that was and when it was?

A. I think it was August 25, 1939. Dr. Long sent me to Dr. McLemore and Dr. McLemore examined me and sent me back to Dr. Long and Dr. Long sent me to Dr. Marshall in the Cobb Building.

(Testimony of R. J. Dudley.)

Q. Were you operated on? A. Yes.

Q. What was it for?

A. Some kind of an infection, I could not say the name of it; it was some kind of an infection.

Q. What part of your anatomy?

A. The rectal region.

Q. Were you laid up long with that?

A. I was in bed two weeks in the Cobb Building, and I was at 9515 Rainier Avenue two weeks and then the Doctor told me I could go home. I was home five days and then returned to bed at 9515 Rainier Avenue. That was in 1939.

Q. 1938? A. That was last year.

Q. What date?

A. August 25, 1938 I was operated on.

Q. Do you have any pain at the present time?

A. Yes.

Q. Where?

A. In my spine and both of my arms from my elbows down into the wrists and hands.

Q. Is it an ache or sharp pain?

A. Aching from my elbows down and a breaking pain in my spine [58] at different times.

Q. Before you were injured, that would be before October 5, 1936, what was your physical condition? A. It was good.

Q. Were you able to do your work?

A. Yes.

Q. What salary were you earning?

(Testimony of R. J. Dudley.)

A. About $190.00 a month, I don't know exactly, between that and $200.00.

Q. If you were capable of working today would you have steady employment? A. Yes.

Q. On the same job? A. Yes.

Q. Does that pay any more today than it did before?

A. Yes, I would not know for sure but I think about $16.00 a month.

Q. That would be about a seven and a half percent increase over what it was before?

A. Yes, approximately.

Q. When did that increase take effect?

A. Approximately a year and a half ago; I am not positive of the exact date.

Q. Anyway, that is a seven and a half per cent increase from what it was before, approximately?

A. Yes.

Q. At the time you were injured, what was your age? A. Fifty.

Q. That was October, 1936? A. Yes. [59]

Q. Mr. Dudley, were you somewhat confused as to the actual directions your train was standing at the Tacoma Depot? A. Yes.

Q. What are the real directions?

A. I was taking the time card directions?

Q. What is the time card direction?

A. North and south is the time card direction.

Q. Even though the train runs east?

A. Yes.

(Testimony of R. J. Dudley.)

Q. Just what are the real directions that train was standing at the Tacoma Depot?

A. East and west.

Q. East and west? A. Yes.

Mr. Hanley: You may cross examine.

Cross Examination

(By Mr. Laughon)

Q. This was on October 5, 1936 that this accident happened? A. Yes.

Q. You know Mr. Townsend? A. Yes.

Q. What work does Mr. Townsend do?

A. He is express messenger.

Q. Was he in the car with you that night?

A. Yes.

Q. I think you said the express business was over in the other end of the car? [60] A. Yes.

Q. He furnished you some first aid there?

A. Yes.

Q. You have known him quite a while?

A. Yes.

Q. Now, you just answered counsel's question about some operation that you had later on, you say that was on August 25, 1938?

A. I am not absolutely positive but I think it was.

Q. Well, it was around there, about that time?

A. Yes.

(Testimony of R. J. Dudley.)

Q. And at that time and for some time prior to that time who had been your doctor?

A. Dr. Long, L. Dudley Long.

Q. Now, I think you told Mr. Hanley that after the accident happened that the Company doctor or somebody for the Association treated you for the first thirty days or while your hand was healing?

A. Yes.

Q. Who was that doctor?

A. Dr. Leaverton.

Q. Then, after Dr. Leaverton got through treating you, you went to Dr. Long; when did you have Dr. Long?

A. Dr. Long first examined me, I think, on November 10, 1936.

Q. 1936? A. Yes.

Q. And your accident happened on October 5, 1936? A. Yes.

Q. Well then, did he examine you while Dr. Leaverton was treating you? [61] A. Yes.

Q. Then, later on you went to work?

A. Yes.

Q. Tell us when it was you went to work, do you remember what month it was?

A. Do I remember what month it was?

Q. Yes. A. The latter part of February.

Q. That would be February of what year; 1937?

A. 1937.

Q. That would be the February following the October you were hurt? A. Yes.

(Testimony of R. J. Dudley.)

Q. Well, it was some three or four months after the accident happened that you went back to work?

A. Four months.

Q. Now then, when you went back to work again, what position did you fill? The same position you had before? A. Yes.

Q. And that was baggage man between Tacoma and Spokane? A. Yes.

Q. That was early in February of 1937?

A. The latter part of February, I think.

Q. Then, you worked how long on that job?

A. About May 8th or 12th.

Q. Well, from February to May? A. Yes.

Q. From March to May, that would be around three months?

A. About two and a half months.

Q. Then, you worked for two and a half months?

[62]

A. Yes.

Q. Then, the hand where you had that scar or that cut, that was healed up when you went to work? A. Yes.

Q. Would you mind showing me where it was?

A. (Showing wrist).

Q. Right here (Indicating)? A. Yes.

Q. That is the place where they put the stitches in? A. Yes.

Q. That is on your left hand? A. Yes.

Q. You say that had healed up at the time you went to work? A. Yes.

(Testimony of R. J. Dudley.)

Q. Now then, it was in May, along about May 8th or 10th that you laid off and did not work any longer? A. Yes.

Q. Then, how long after you laid off, approximately, was it when you had this operation; was it in the same year?

A. About a year and a half later.

Q. You didn't have the operation then until 1938?

A. From May, a year and three months.

Q. That would be May, 1937 that you laid off, then you think it would be August, 1938 that you were operated on? A. Yes.

Q. During that time from the time you laid off, was Dr. Long your same doctor? A. Yes.

Q. He was doctoring you, treating you?

A. Yes. [63]

Q. I suppose you had this operation, submitted to it on his request or suggestion? A. Yes.

Q. What doctor operated on you?

A. Dr. Marshall in the Cobb Building in Seattle.

Q. He is a doctor in Seattle? A. Yes.

Q. That was, you think, in August of 1938; that would be not quite a year now? A. Yes.

Q. Now, do you know what was your trouble that caused you to have that operation?

A. I can't think of the name the Doctor said; tyroid tumor.

Q. I will ask you this question——?

(Testimony of R. J. Dudley.)

A. Dermoid tumor in the rectum.

Q. That was in your rectum? A. Yes.

Q. Near the extremities?

A. I could not say; probably about two and a half or three inches towards the hip; underneath the membrane towards the left hip.

Q. That was a tumor?

A. I could not state just what it was. It was some kind of infection, something like that.

Q. That was paining you? A. No.

Q. There was a secretion from it, or, do you know? A. Yes.

Q. And had been for a while?

A. No, I don't know. [64]

Q. Anyway, your physician, Dr. Long, recommended the operation and performed it—had it performed, rather? A. Yes.

Q. Now, that operation was performed by Mr. Marshall? A. Yes.

Q. Now, after that operation was performed and this thing was removed, you know you got better, don't you?

A. Yes, along in November. I showed improvement in November.

Q. Your limbs and arms gave better motion?

A. In the arms and my knees.

Q. And your back?

A. My back is better at times and at times it is worse.

(Testimony of R. J. Dudley.)

Q. About a week ago, something like that, you were examined by Dr. Nicholson and Dr. Leaverton? A. Yes.

Q. That was the same Dr. Leaverton that treated you after the injury? A. Yes.

Q. That examination was in Seattle?

A. Yes.

Q. In that examination, didn't you tell these doctors that since that operation—you told them of the operation and removal of the tumor?

A. Yes.

Q. Didn't you tell them in that examination that since then you felt better, your knees and back felt better? A. Yes.

Mr. Laughon: That is all.

Mr. Hanley: No further questions.

(Witness excused) [65]

WILLIAM S. JOHNSON

a witness produced by the plaintiff having been first duly sworn, testified as follows:

Direct Examination

(By Mr. Hanley)

Q. Your name please?

A. William S. Johnson.

Q. And your occupation, Mr. Johnson?

A. I have none.

(Testimony of William S. Johnson.)

Q. In October, 1936, what was your occupation?

A. Railway conductor.

Q. Since that time you have retired?

A. Yes.

Q. You were in the employ of——?

A. Chicago, Milwaukee, St. Paul, and Pacific Railroad.

Q. How long were you in the employ of the Chicago, Milwaukee, St. Paul, and Pacific Railroad?

A. Fifty years and six months.

Q. Do you know Mr. Dudley, the plaintiff in this action? A. I do.

Q. How long have you known him?

A. Twenty-five years.

Q. And on the evening of October 5th, I think it was, was he a member of your crew?

A. Yes.

Q. In what capacity?

A. Train baggage-man.

Q. Were you the conductor of train No. 16 that evening? A. Yes, sir.

Q. Who else was in the crew with you? [66]

A. M. T. Smith.

Q. He was one of the brakeman?

A. I think the rear brakeman but I could not tell without referring to my book.

Q. What time was the train due to leave Tacoma? A. 8:00 P. M.

(Testimony of William S. Johnson.)

Q. Did you have on that train any passengers destined beyond the State of Washington?

A. Yes, sir.

Q. Where were they going?

A. To various places between Tacoma and Chicago.

Q. Likewise, did you have any packages on that train addressed out of the State of Washington?

A. Yes.

Q. What time did you report for work, Mr. Johnson? A. I reported a little before 7:30.

Q. Did you see Mr. Dudley about the time he was there, about the time he reported for work?

A. Yes.

Q. He got there about the same time as you?

A. I think he was there about that time or soon after.

Q. On this night in question, was it light or dark when you reported for work?

A. My recollection was that it was dark.

Q. And the train was where?

A. Standing on track No. 1, next to the station.

Q. At Tacoma?

A. Yes, 25th and A Streets, Tacoma.

Q. What are the directions that the train was standing in, East and West or North and South?

[67]

A. East and West approximately.

(Testimony of William S. Johnson.)

Q. The time card gives the directions as North and South?

A. No, it is not, it is East and West approximately.

Q. Did you observe the baggage car about the time or shortly after you reported for work?

A. No, but I know it was there.

Q. Did you see whether or not there was anything in the door of it? A. No.

Q. When did you first go into the baggage car that evening?

A. After Mr. Dudley reported and showed me an injury on his left wrist.

Q. What time was that, about?

A. Shortly after 7:30, I don't know the exact time.

Q. Where were you?

A. I was making reports in the day coach; it was next to the baggage car.

Q. Did Mr. Dudley come back into the car?

A. Yes.

Q. What was the condition of his hand?

A. It was bleeding.

Q. The left hand, you say? A. Yes.

Q. Where was the cut in it?

A. Just back of the wrist bone.

Q. On the little finger side of the left hand?

A. Yes.

Q. Was it bleeding profusely?

(Testimony of William S. Johnson.)

A. Quite a bit.

Q. What was done then, or did you do anything in connection [68] with relieving him from work?

A. Yes, I immediately went in the passenger office to arrange for relief for him.

Q. Was the express messenger there, Mr. Johnson, or do you know?

A. I could not swear to that.

Q. Did you go into the baggage car before you left Tacoma? A. I believe I did.

Q. Did you make an examination, or did you see a smoke-jack lying there? A. Yes.

Q. Did it look like this, Exhibit No. 1, that we have here?

A. No, it didn't; it looked like it was a new one.

Q. Could you give the dimensions of it, about?

A. I don't know, I didn't measure it. My recollection was it was about six feet long and it was made of metal.

Q. Like the one there?

A. Yes, like the one there.

Q. Did you observe any disk on it at all?

A. I did later.

Q. How soon after?

A. Well, after we left Tacoma.

Q. Did you examine the disk?

A. *No* overly.

Q. Well, did you make a sort of an examination?

A. I looked at it, yes.

(Testimony of William S. Johnson.)

Q. What did you observe in connection with it, whether it was sharp or dull, or did you make that kind of an examination?

A. It was a raw edge of thin metal, that is all I could see.

Q. The disk I am speaking of was somewhat similar to this one? A. Somewhat, yes, sir.

[69]

Q. Was it flat at the time or was it bent like that one? A. I could not say.

Q. The disk, do you know whether it was loose?

A. It was loose on the pipe.

Q. Do you know about how much play it had on the pipe?

A. Just enough so it could slide up and down.

Q. Could you say how far it would slide up and down?

A. I think from the "T" down, I am not sure about that.

Q. Was there a guard piece on the bottom?

A. I think so, yes.

Q. You stated that was loose?

A. That was new metal and quite pliable.

Q. Would it slide up and down?

A. No, I think that was stationary.

Q. The stationary piece, how far up was that from the floor?

A. I could not answer that because I don't know.

Q. Was it up higher than that (indicating on smoke-jack)?

(Testimony of William S. Johnson.)

A. I think it was a little higher than that.

Q. Had you ever seen any of those smoke-jacks shipped before, Mr. Johnson, in the baggage cars?

A. I have not.

Q. When you went in the car was there much company material in the car, packages?

A. There was some, I don't know how much. I didn't check that, I had no occasion to.

Q. Where was the jack standing at the time you looked at it, was it standing up or was it on the floor?

A. When I first went in I don't recall where it was. Afterwards it was laying up out of the way on a pile of laundry so nobody could get accidentally against it. [70]

Q. Did you notice any blood on it?

A. I didn't.

Q. Did you observe the lighting of the baggage car when you first went into it?

A. I am sorry, I didn't.

Q. The lights in the car, do you know how many they have, that is the number?

A. Approximately what Mr. Dudley told you; there is a string along the center of the roof and one along each door.

Q. Did you carry a lantern?

A. Not in the train, no.

Q. You didn't have one with you when you went into the baggage car?

(Testimony of William S. Johnson.)

A. No, but I did later.

Q. That was after the train started?

A. Yes.

Q. Now, Mr. Johnson, is there any difference between the lighting in the baggage car when the train is standing still, before it moves out of Tacoma, and when it is moving?

A. Generally, the best effect is when the train is moving, it is lighter.

Q. Do you know why that is, Mr. Johnson?

A. Well, I think I do.

Q. Why is that?

A. Because you are taking from the storage batteries when you are standing and from the generators while moving.

Q. Is there a generator on each individual car?

A. Yes, sir.

Q. How many lights did you have on the day coaches? A. About forty. [71]

Q. You have plenty of light in the day coaches, they are well lighted? A. Yes, sir.

Q. And in the baggage car there is about the number that Mr. Dudley stated? A. Yes, sir.

The Court: How did the lighting of this baggage car compare with the lighting of the day coaches, if you observed it at all?

A. I didn't, Your Honor. It was not such that called my attention to it.

Q. In other words, you could see around you?

(Testimony of William S. Johnson.)

A. I could see.

Q. From the lights on the ceiling and the lighting on the doors? A. I could see, yes, sir.

Q. Were objects that were in there visible to you? A. All that I looked at, yes.

Mr. Hanley: Q. Are there any reflectors on those lights in the baggage car, Mr. Johnson, if you know?

A. Some of them have and some haven't, I think.

Mr. Hanley: You may cross examine.

Cross Examination

(By Mr. Laughon)

Q. As I understood you, Mr. Johnson, when you went in, either before the train left or after, you looked at this smoke-jack? A. Yes.

Q. Did you look at it twice? [72]

A. I could not swear that I went in there and looked at it before I left; I did afterwards.

Q. It still remained in the baggage car when you went on to Spokane? A. Oh, yes.

Q. You said something about a guard or something around it, I understood you to say it was made out of metal? A. That is my recollection.

Q. This metal you see in this pipe of course, is light, new? A. Yes.

Q. Is that the same color that the smoke-jack was at that time? A. Yes.

Q. It was the same kind of material?

(Testimony of William S. Johnson.)

A. I think so.

Q. And of that same color? A. Yes.

Q. It was real new then? A. Yes.

Q. You have seen lots of smoke-jacks?

A. Yes.

Q. Look at the one which is marked Exhibit No. 1, this one here (indicating), this shows us, of course? A. I should say so.

Q. That is what caused the difference in the color? A. Yes.

Q. The color of the one that went out that night on the road, it would be the same color as this if this pipe was new? A. Yes.

Q. Now, you said that the sleeve around it or whatever it was that was around it was loose on there? [73] A. That is my recollection.

Q. I wish you would look at the edges of this, I would like to have this marked as an Exhibit for cross examination.

The Court: As defendants Exhibit Number 1.

Mr. Laughon: For cross examinations.

The Court: Those rules don't apply any more. You can cross examine and put it in as a defendants' Exhibit and you don't waive your right to make a motion for insufficiency of evidence.

Mr. Laughon: Q. Look at defendants' Exhibit Number 1 which is galvanized pipe, and you look at the edge of it, the metal or tin, and tell the jury whether or not this sleeve that you saw on there

(Testimony of William S. Johnson.)

had the same type of construction and edge that you see on this?

A. My recollection of it was it was just the rough edge of the metal.

Q. Metal of this kind? A. Yes, as I recall.

The Court: Q. Counsel wants to know if it was an edge different than that, was the edge such as caused by cutting it down as to cause it to be corrugated or jagged?

A. I don't think it was milled out; it was the natural edge.

Q. It was not sharpened out like a knife?

A. I think not, just the raw edge.

Mr. Laughon: That is all.

The Court: I forgot to say in conjunction with the last witness, it is my custom to allow any jurors to ask any questions if the spirit moves them. I think quite a number of this jury has served in jurys before me [74] this last three or four weeks. If you desire to address any question to any of the witnesses you may do so and if it is an improper question I will tell you so. I never instruct on facts or give my opinion on facts, although I have that right, but I have never done so except in one particular instance. You have to determine the facts and you are free to ask any question to qualify any statement made by the witness if his testimony is not clear in your mind.

Mr. Hanley: No redirect examination.

(Witness excused)

(Testimony of Raymond John Dudley.)

A Juror: Q. I would like to ask Mr. Dudley a question, if I may.

The Court: We will have Mr. Dudley take the stand so you may do so. [75]

RAYMOND JOHN DUDLEY

The plaintiff herein having been recalled, testified further as follows:

Direct Examination

A Juror: Q. At the time of the accident were you wearing gloves? A. No.

A Juror: Q. Would you advise, if a private shipper, if he were shipping that, would it be in that same form? A. I don't think so.

The Juror: Would it be necessary that it be crated? A. I think so.

Mr. Laughon: Q. This material you talked about being in the baggage car, is what you call company material, and this was company material?

A. Yes.

Q. And this was company material which was going from the place where it was made to a point in Spokane? A. Yes.

A Juror: Is it customary for the company to ship that sort of thing in the condition it was being shipped in? A. No.

The Court: That last answer will be stricken because he has testified he does not know that. He testified he had never seen any being *shipping* be-

fore, so he would not be in a position to say whether it was customary or not, so the answer is stricken. [76]

The Court: If there is no further questions the witness will be excused.

(Witness excused) [77]

L. DUDLEY LONG

A witness produced by the plaintiff having been first duly sworn, testified as follows:

Direct Examination

(By Mr. Hanley)

Q. Your name, please? A. L. Dudley Long.

Q. What is your profession?

A. Physician and Surgeon.

Q. Where, Doctor, were you licensed to practice medicine and surgery, by each state? A. 1909.

Q. By what state? A. In this state.

Q. The State of Washington?

A. Yes, and Illinois too.

Q. You have practiced your profession as a physician and surgeon in the State of Washington here, for the past how many years?

A. Well, thirty years.

Q. What is your address?

A. I live in Seattle.

Q. Where is your office located?

(Testimony of L. Dudley Long.)

A. It is located in the Fourth and Pike Building.

Q. What position, if any, do you hold in the State?

A. I am the medical officer, Medical Director of the Department of Labor and Industries.

Q. That has to do with what law?

A. The law that covers injured workmen. [92]

Q. That is, under the Workmen's Compensation Act? A. Yes.

Q. You have how many doctors under you?

A. None at present.

Q. You are the only physician, yourself, for this body, or Department? A. Yes, sir.

Q. Have you frequently examined injury claims?

A. I examine a great many.

Q. How many would you say you examine in a months time, doctor, could you approximate it?

A. Oh, anywheres between fifty and maybe a hundred.

Q. Each month? A. Yes.

Q. Do they have all of the various kinds of injuries?

A. I see every type and the result of every type of injury that takes place in this State.

Q. You have been examining for the Department for how many years, about? A. Since 1933.

Q. Since 1933? A. Yes.

Q. Does that take up a large part of your time?

A. Yes, it does.

(Testimony of L. Dudley Long.)

Q. In fact, did you just come from Olympia now? A. Yes, sir.

Q. You were over there now with the department? A. Yes.

Q. Do you know the plaintiff, Mr. Dudley?

A. I do. [93]

Q. Have you ever treated him as a physician?

A. Yes, sir.

Q. When did he first come to you, doctor?

A. November 10, 1936.

Q. Did you examine him at that time?

A. I did.

Q. Would you just state to the jury what your physical examination disclosed?

A. Well, he had an infected wound on the outer side of the left wrist right here at the end of the Ulna (indicating) and there was a crust on it. He gave me the history that on October 5, 1936, he had cut this wrist on a piece of tin while he was working and it became infected and that it kept healing up and breaking out again and kept draining. It healed up and he became very upset about it because it kept healing up and breaking out again. I didn't understand why he came to me for advice because he was a railroad employee but, I gave him the advice that he was to continue with his treatment.

Q. Did he tell you at that time who was doctoring him?

A. I understood, the railroad doctors, but I didn't ask who they were.

(Testimony of L. Dudley Long.)

Q. It was railroad doctors, anyway?

A. Yes, sir.

Q. Now, did you make a general physical examination?

A. No, I didn't. I didn't think much of it at that time and simply gave him that advice. I just happened to make a notation on it that he came to see me.

Q. Could you determine, or did you determine, when you examined him at that time, the nature of the infection? [94]

A. No, it had a crust on it at the time I saw him.

Q. What ordinarily causes an infection?

A. An infection of some germ, the staphlyococcus or streptococcus, that is one that is more virulent. An ordinary wound such as this, is usually caused by the staphlyococcus.

Q. Did you make any slides or microscopic examination of the infection? A. No.

Q. Did you say the staphlyococcus is more virulent?

A. I said the streptococcus form is more virulent.

The Court: Q. You could not tell which it was?

A. No.

Q. Doesn't the virulent spread rapidly?

A. Yes, that is true.

Q. And involves a large area?

A. Yes, the staphlyococcus has slow action.

(Testimony of L. Dudley Long.)

Mr. Hanley: Q. When did you see Mr. Dudley again?

A. I didn't see him again until 2/15/37.

Q. Did he come to you for professional treatment at that time? A. Yes, he did.

Q. What did you do for him?

A. He told me that the wrist, after he had seen me the first time, opened and drained about two weeks quite freely after it had been closed up, and after that he felt much better. Then, he began to have pain in his right arm just above the elbow, in here (indicating) and his examination showed that the head of the bone was tender to pressure when you squeezed it, and also that the inner side of his [95] right knee was hurting him and the knee was tender; but there was nothing definite to be seen with either of his elbows so far as the coronary process was concerned by the eye. It was tender to pressure and if you flexed the arm actually it hurt him. The knee actually hurt him past the usual range of motion.

Q. What did you do for him?

A. I gave him medicine, salicin, a remedy we use in rheumatism and arthritis. At that same time his knee would pop if you flexed it, there was a pop in his knee.

Q. When was the next time you saw him?

A. The next time was 3/29/37.

Q. March 29, 1937?

(Testimony of L. Dudley Long.)

A. Yes, sir; and he said he had gone to work four, five or six weeks but his knees were giving him trouble. I think he was handling packages or mail bags or something like that and the jolting of the train hurt his knees and it made his right arm and his elbow ache, in the handling of these bags. He was complaining at that time, that the condition seemed to be increasing and getting worse and he had a spell of nausea at times, sick at his stomach at times. I prescribed for him, at that time, I gave him a tonic and some medicine to combat the pains in his knees.

Q. Did you examine the parts he complained of at that time? A. Yes.

Q. Were they tender to touch?

A. Yes, the same as before.

Q. And the next time you saw him again was when?

A. I examined him 4/16/37. I made no notes especially on it except that he feels the same, that there was no change [96] in his condition and we continued the treatment we was using on him?

Q. Doctor, the records you are testifying from, were those kept by yourself? A. Yes, sir.

Q. Go down the line on it and explain to the jury the times you saw him and what you did for him, go through the whole list?

The Court: If the usual routine was followed that he began treating him with, I don't think you

(Testimony of L. Dudley Long.)

need to tell the treatment each time, just tell us on the whole, how often you saw him and then if you had more than one routine of treatment, tell us what the other treatment was?

A. Well, on 5/17/39, he gave the history that the left wrist began swelling up and paining considerably and I prescribed for him again at that time. His knees and elbow were the same and while we continued along about that line of treatment, I have seen him only, in all, I think, about fifty-five or six times.

Q. When was the last time you saw him, doctor?

A. Well, I saw him again the 25th and 27th of this last July and today is the second time this month.

Q. You saw him just a few days ago?

A. Yes.

Q. Go ahead.

A. On 8/17/37, he gave the symptoms of pain in his spine and in his neck and his whole spine would pop and crack on various bendings and various motions and this went down into his pelvis and knees.

Q. Was that verified by objective symptoms?

[97]

A. Yes, you could hear this pop in his hips and knees and at this time I noticed on each side of his kneecap a little bit of swelling and redness. There was a little bit of fluid that had come into his knees and it was tender to pressure on the heads of the bones and on the side. Any pressure hurt his knees.

(Testimony of L. Dudley Long.)

I put him on salicin and that is a drug we use in arthritis. We continued along that way and he improved a little at times but, at other times he was worse and along about—later, well, I don't say he exactly cried but he began to feel that he was not going to recover from his condition at all. He became very discouraged and disappointed and he would cry while explaining his condition and I felt that I would like to have him examined by some other physician. On 8/2/38, I sent him to Doctor McLemore in Seattle. He is an orthopedic surgeon and used to handling these types of cases, and on 8/5/38, I talked to Doctor McLemore and we talked his condition over.

Q. Did you examine him just previous to that time, doctor? A. Yes, sir.

Q. Go ahead.

A. And the doctor recommended some treatments of some tissue extract, we call it a vitamin B extract, that is used in run down conditions and arthritic conditions, and he recommended that we put him on some kind of cod liver oil to build him up. And Doctor McLemore in his examination examined the rectum and found a little tumor just inside of the rectum on the left side. I thought it might be an abscess when he called my attention to it but I examined him again and it felt too hard to be an abscess so I thought [98] I would send him to some specialist. He went to Doctor George Marshall who is a rectal specialist and he said it was a

(Testimony of L. Dudley Long.)

little tumor and that it should come out. He said it was infected and it was draining and so, on August, I believe it was 8/25/39, Doctor Marshall removed this tumor. He said it was a Dermoid Cyst. A dermoid cyst is a little tumor that comes, probably he was born with the condition and something irritated it and it broke down and began to drain. This dermoid cyst is a peculiar type of tumor in that it contains hair and some of them will contain bone and some even teeth. And when a dermoid cyst begins to drain and is infected it has an effect upon the whole system and caused Mr. Dudley to be worse. For this was open for a considerable length of time but two months after that was removed, he began to feel better, that is, his knees felt better and his wrist felt better. Then we continued on the arthritic treatment and we have continued so up to the present time. He gets up to a certain stage where he is just so good, where he is quiet, he gets along fairly well that way but, if he begins to do anything he gets worse so, I felt he has a form of atrophic arthritis.

Q. Could you say, in your opinion, what that is caused from?

A. I believe it was as a result of this infection that came in his wrist.

Q. That is what you saw when he first called on you? A. Yes, sir.

Q. What would you say, in your opinion, as to whether or not his condition is permanent?

(Testimony of L. Dudley Long.)

A. The condition is more hopeful than it has been in the past. [99] We used to feel these conditions were never cured but under recent treatment in the past five years the prospect is much better of making this man have a comfortable life; in some conditions they are uncurable but in some conditions we cured them.

Q. Would you say his condition is temporary or permanent?

A. In my opinion, I believe it is permanent.

Q. When did you examine him last??

A. July 25th and 27th.

Q. 1939? A. Yes, sir.

Q. On this last examination what would you say as to whether or not he has any physical ability to perform any active work of any kind?

A. He is unable to do any manual labor at all. He can do something like washing dishes, he could run an elevator with a lever to it and he could do a watchman's work if he didn't have to walk around too much.

Q. Could he do any work that required the activity of his body? A. I don't think so.

Q. Have you, or from your examination and from your information, do you have any opinion as to what caused that dermoid cyst?

A. That is a thing that is not caused, it was already there.

Q. But, it was infected, you say?

(Testimony of L. Dudley Long.)

A. That is what Doctor Marshall said, I could not say.

Q. You didn't discover that?

A. No, I didn't know he had it until my attention was called to it.

The Court: It was a general condition?

A. That is right. [100]

Mr. Hanley: You may cross examine.

Cross Examination

(By Mr. Laughon)

Q. You made your first examination, doctor, on November 10, 1936? A. That is right.

Q. That was the first time you had seen Mr. Dudley?

A. I had known him for about ten years.

Q. That is the first time you examined him?

A. Yes, that is right.

Q. During the time you knew him before, you had made no physical examination of his condition?

A. No, sir.

Q. At that time, on November 10, 1936, you saw this place on his hand?

A. On his wrist, yes.

Q. He told you, or you knew that that came from, or that that condition on his wrist was the result of an injury on October 5, 1936?

A. October 5, he said.

Q. Then, you examined him the first time on November 10? A. Yes, sir.

(Testimony of L. Dudley Long.)

Q. That would be a little over a month from the time of the injury? A. Yes, sir.

Q. Was it infected there at that time?

A. Yes, there was a crust.

Q. Did the infection at that time, seem to be local?

A. The infection seemed to be local, yes. [101]

Q. That was November, 1936?

A. That is right.

Q. And then, you examined him again in February, 1937? A. Yes, sir.

Q. Did you make any examination during that time of a, have him X-rayed for arthritis?

A. I took one picture on 5/23/38, that was the knees.

Q. On May 23, 1938? A. Yes, sir.

Q. You took an X-ray photograph at that time?

A. Yes, sir.

Q. Did you take any X-rays of anything else except that knee? A. No.

Q. Was that the right or left knee?

A. Both knees.

Q. Both knees? A. Yes.

Q. There was no examination or pictures taken of the arms or any of the parts?

A. No, sir.

Q. Now, you made further examinations at different times? A. Yes, sir.

Q. When did you discover or when was it discovered that there was a dermoid tumor?

(Testimony of L. Dudley Long.)

A. That is when Doctor McLemore examined him.

Q. That was in the month of—about what time of year? What day? A. That was in 1938.

Q. November 4, was when you took those X-rays?

A. Yes, that was about the same time. Doctor McLemore examined [102] him on 8/3/38.

Q. August 3, 1938 was when you called in this other doctor? A. Yes.

Q. Who did you say that was?

A. Doctor McLemore.

Q. At that time, you had under consideration, did you, this question of this dermoid tumor?

A. I discussed it after he found it; I didn't know it was there.

Q. He found it?

A. Yes, and I examined it later.

Q. You made an examination of this tumor at this time? A. Yes.

Q. Where was it located?

A. On the left side, just inside of the rectum.

Q. Pretty well down? A. Yes.

Q. Just where was it?

A. About, at least an inch of the sphincter muscle.

Q. That was apparent there at that time?

A. Yes.

Q. Did he carry an infection at that time?

A. Doctor Marshall said it was infected.

Q. Doctor Marshall, was he there at the time you made this examination?

A. No, I sent him to him.

Q. When was the examination made by Doctor Marshall, after you made the examination or, I believe you said that the other doctor found it in his examination?

A. Well, it was after Doctor McLemore examined that I sent him to Doctor Marshall; I don't know just that exact date. [103]

Q. You examined him and then, you concluded you had better send him to Doctor Marshall?

A. Yes, I examined him and then sent him to Doctor Marshall.

Q. You sent him to Doctor Marshall, I understood you to testify, because he was somewhat of a specialist with these tumors?

A. Of rectal conditions, yes.

Q. And he went there shortly after that?

A. Yes.

Q. You knew there was an operation performed?

A. Yes.

Q. Were you there at the time it was performed?

A. No, sir.

Q. Do you know the result of the operation?

A. Yes, sir, I examined him after the tumor was removed.

Q. From that examination could you tell us anything, give us any opinion as to how long that tumor had existed?

(Testimony of L. Dudley Long.)

A. I could give you no information at all on that, it was probably there ever since he was born.

The Court: The Doctor said it was congenital.

A. Congenital, yes, sir; in other words, the same as a hereditary infectious disease.

Mr. Laughon: Q. Now, what was in this dermoid tumor when you examined it, what did you find it to contain?

A. Doctor Marshall removed it and called me up and told me what it was.

Q. You made an examination afterwards, didn't you say?

A. I didn't see it after it was removed.

Q. Then the only information of what it contained was what Doctor Marshall told you?

A. Yes, sir. [104]

The Court: He said generally they may contain anything, hair, bone, or teeth.

Mr. Laughon: I didn't understand, he testified that the Doctor told him what it contained.

The Witness: No, he told me it was a dermoid cyst, that is all he told me.

Mr. Laughon: Q. Well, Doctor, from your examination, and your examination of the patient there, would you say that it is possible or likely that this dermoid tumor might have caused or assisted in the poisoning of the plaintiff?

A. If it broke down after it began to drain it would be one of the causes.

Q. When did it began to drain?

(Testimony of L. Dudley Long.)

A. That is what I don't know.

Q. Was it draining at the time you made your examination?

A. I could not see if it was draining, I could not see any but Doctor Marshall said that it was.

Q. What instruments did you use in examining him?

A. Proctoscopes, I have two of them and I used both on him in examining him.

Q. Well, if the tumor was draining would it cause general infection?

A. It would cause, might cause some systemic condition through absorptions from it, yes.

Q. That would be what we call an infection?

A. Infection, yes.

Q. That, of course, would affect the whole system? A. Yes.

Q. And affect the blood and so forth? [105]

A. Yes.

The Court. Assuming that cyst existed and had been discovered at about the time of this injury and infection followed it, would it be possible for you, in the light of the history which you have, to determine which of the two causes might result in the systemic condition that you described?

A. I can state my opinion in the matter, Your Honor.

The Court: Q. All right, state your opinion.

A. I believe it came from his wrist; I don't believe that the tumor in the rectum broke down until some months later.

(Testimony of L. Dudley Long.)

Mr. Laughon: Q. As I understand, Doctor, from the time that the tumor broke down, to use that construction, when it did break down and began to drain, from that time on was that condition caused by that tumor?

A. What condition?

The Court: His lack of vitality.

A. That infected tumor might have added somewhat to his condition.

Mr. Laughon: Q. You have examined him several times since then, when is the last time you have examined him?

A. On the 27th of July.

Q. Of this year? A. Yes.

Q. July, of this year? A. Yes.

Q. Well, the condition you found to exist there, what would you say, doctor, as to whether or not that condition that you found existed could have been caused by this tumor [106] after it broke down? A. Not entirely, no.

Q. It could have simply aggrevated a condition he already had?

The Court: Making it a contributing cause, doctor, is that right?

A. A contributing cause, yes, sir.

Mr. Laughon: Q. In your later examinations, is it not a fact, doctor, that you found he has improved since the operation?

A. He has made some improvement.

(Testimony of L. Dudley Long.)

Q. In other words, he is better?

A. He is better, yes.

Q. He has a reasonable chance to continue to improve, don't you think?

A. That is a doubtful question and that is a question that is hard to answer; he may and then again he may not.

Q. The fact that he has improved would tend to show that he would continue to improve, wouldn't it?

A. He has improved up to a certain point but, whereas, if he tried to do any laborious work, strenuous work, he would be right back where he was before.

Q. You think he has a case of arthritis, doctor?

A. Yes.

Q. Well, arthritis is not at all uncommon?

A. It very, very common.

Q. And all of us more or less have arthritis?

A. Yes, we do.

The Court: Q. After a certain age, I suppose.

A. Yes, your Honor, that is right.

Mr. Laughon: Q. It is something you can [107] recover from and go ahead and do your work?

A. A great many can go ahead and do their work and don't know they have it but there are days when something goes wrong and then it develops to a greater extent.

Q. That does not result in permanent disability, does it? A. I will say that it does.

Mr. Laughon: That is all.

(Testimony of L. Dudley Long.)

Redirect Examination

(By Mr. Hanley)

Q. Doctor Long, you took X-rays of this plaintiff's knees on 5/23/38, you say?

A. On 5/23/38, yes.

Q. Did the plates show any bony malformation?

A. Yes, it shows bony malformation and it shows arthritis in the knee.

The Court: By a deposit?

A. It shows what we call splints of bone, you can see them there (indicating on X-ray), these two sharp things sticking up on the end of the tibia on the knee, they are very sharp. On the right one you can see a little bony growth out on the edge of it; that is always indicative of arthritis.

The Court: Q. Do both plates show the same thing, doctor?

A. Yes, your Honor.

Mr. Hanley: We will offer them in evidence.

The Court: They may be received as one exhibit. [108]

Mr. Laughon: I make a motion to dismiss the action brought by the plaintiff upon the ground, first, that the plaintiff has failed to show actionable negligence against the defendants or any of them that was or could be the proximate cause of the injury to the plaintiff, if any; the motion is based on the further ground, that it appears from

(Testimony of L. Dudley Long.)
the testimony of the plaintiff, uncontroverted in the case and indisputed, that the injury, if any, that the plaintiff received, was due to the risks and dangers [122] incidental to his employment at that time, which were open and apparent, which were known and appreciated by the plaintiff or could have been known at the time of the injury. Now, I make the motion on the further ground, that under the evidence of this particular case, the plaintiff's acts, what he did with reference to this smoke-jack, was the sole and proximate cause of any injury received. [123]

COURT'S DECISION

The Court: Gentlemen, I have allowed extensive arguments because I felt that, irrespective of the conclusion that I reach in this matter, a discussion of the problems of law involved would help clarify to the Court the position of the parties, so that even though the motion be denied, the Court would have the benefit of that as a guide in instructing the jury. I think the disagreement between counsel can be outlined in this manner, the difficulty results not so much from what the law is, but from the application of the law to the particular facts. As I had occasion to say yesterday, that the principle of proximate cause is well known and the principle is recognized as ultimately the question of what the proximate cause was for the

jury to determine. Contributory negligence is out of the case because of the Employer's Liability Act, I think it is Section 53 of Title 45. * * * (Citing cases). [124] The facts clearly show, whether you approach them from the standpoint of proximate cause, that the proximate cause of the injury was not anything that the defendant did. The defendant placed this object in the car but it was there in full view. While it is true it was possibly dim, it is evident that there was ten twenty-five watt lights in the center of the car and for a man working near the door at 7:30 o'clock in the afternoon, they provided light enough to see the objects there, he could distinguish them there. He saw the jack, and said it was made of corrugated iron. He saw under it and above it and around it where there was other objects that he had to handle in performing his duty. He was there for the purpose of arranging the car and started out arranging the car to suit himself. Had this jack been set up by the company and had he, while removing one of the sacks, caused it to fall and came into contact with it, it might have presented the question to the jury as to whether placing it in that position where it might fall didn't present a question of fact. Now, repeatedly we have cases of negligence involving falling objects and in these cases it is held that where the object was placed by the employer in a position where it might fall and it did actually fall and someone has an injury, invitee or em-

ployee, the question then is one for the jury. But, in this particular case the object was placed by the employer in a position where it didn't cause the injury, where it could not cause the injury unless he stumbled against it, assuming that it had a raw edge. In arranging his objects to suit himself, it is true it was his duty to pick up the objects, but he was under no compulsion to arrange them in any [125] particular manner. The baggage had not came yet; there was no one in front asking for the baggage truck and no one hurrying him about his work. He had reported for duty and went in there to arrange his place for work. He saw these objects and proceeded with the arrangement of them in a manner to suit himself. Had something happened, had the steel strapping on the end of those boxes caused the sharp edge to come into contact with his hand, then the question of negligence would become factual, but I don't remember any thing of that sort happening in this case. He picked up the package and held it over to the light to read the small label attached to it and saw it was destined for Spokane. Immediately he proceeded to put it back and arrange it in a manner he thought was a proper manner and arranged it against the wall in a standing position and then stooped and proceeded to work on the packages near and about it and it fell. Now, we don't know why it fell; many causes might have intervened; it might have been that he pulled something from in

back of it or placed something right under the stack or that it may have been he placed it insecurely against the wall; in other words, we have any one of three or four causes that might have caused it. And there is no cause that is traceable to the employer but, even if we assume that the presence of this sharp instrument may have been the cause, we have several other causes and, under the authorities of these two cases, a jury would have to speculate, as to which cause was the proximate cause of the injury, but I will go further and say, if the sole cause of the injury was, as alleged in the complaint, the coming in contact of the plaintiff's wrist with this smoke-jack and that occurred after the plaintiff had placed it in a position, and the only position, in which [126] it could fall and hurt him, that that was the proximate cause of the injury. I would go further and say, if it were the case of an axe, if we assume he had an axe with a sharp edge, placed there unprotected, that if in placing it out of the way he had suspended it on a nail and it had fallen off and damaged him, there could be no recovery. Yesterday, I referred to a situation where we assumed that in placing several objects or packages he had placed them on top of each other and the top one had fallen off and the top one was found to contain heavy matter or some liquid that might be injurious to the human body, there could be no claim when the act of the employee, in arranging the material, caused that to

come into contact with his body. There is no act traceable to the employer when the employer placed upon the premises an object which might have caused the injury under other circumstances, that is, if it had been allowed to remain as it was, but, in fact it was not, the cause being the act of the employee in arranging the material.

I do not think that the presence of an object of this character, large and visible, which merely has a raw edge resulting from the ordinary cutting of corrugated iron, can be called a dangerous object so as to bring the case within the Squib case. For one thing the situation is so entirely different that it would require stretching our imaginations between this situation and the situation where one puts into motion a series of events which is responsible for the injury. There must be a violation of duty and the doing of a thing which results in the injury. Here the placing of the jack in the car could not by any stretch of the imagination have been the proximate cause of the injury. [127] It was his act in putting it up in a position where it would fall on him. It might be conceived that if a dangerous object were placed in a place of work and the employee, in order to protect himself, moved it to a place adjacent which proved to be just as hazardous as the one originally existing, we might claim a continuity of events, but here there is no continuity whatsoever. The entire continuity was broken. If he had set it up in a safe

way he could not have been hurt. Here it was the quick force of his arm against the falling object that caused the injury, and we do not know which of the many causes caused it to fall and not one of them is traceable to the original placing of the object by the defendant.

It is always disagreeable for Courts to have to determine that a person who evidently was injured is without remedy but we cannot create liability where the law says it does not exist and the law having said that the liability of even an employer is based on fault only, and where it affirmatively appears that it is not at fault, the fault being solely that of the employee, it becomes the duty of the Court to disregard the sympathy it might have for a person, and determine the matter strictly according to the dictates of the law, because ultimately the meaning of the rule of law which is the fundamental of our judicial system, is that it is binding upon the Courts as well. Courts cannot disregard the principles of law which are established by the Congress or the Legislative Body and interpreted by the Court and which limit liability to the circumstances of certain facts only.

The defendant's motion to dismiss will be granted and the case will be dismissed. [128]

Mr. Hanley: May I automatically be granted an exception under the Court's ruling?

The Court: Yes. Call in the jury.

[Copy Endorsed]: Filed Nov. 29, 1939. [129]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT

United States of America,
Western District of Washington,
Southern Division—ss.

I, Elmer Dover, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing Transcript of Record, consisting of pages numbered 1 to 134 inclusive, is a full, true and correct copy of so much of the record, papers and proceedings in the case of R. J. Dudley, Plaintiff and Appellant, vs. Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, Defendants and Appellees, numbered 8594 in the District Court of the United States for the Western District of Washington, Southern Division, as required by Appellant's Designation of Contents of Record on Appeal on file and of record in my office at Tacoma, Washington, and the same constitutes the Transcript of the Record on Appeal from the Judgment of Dismissal and ruling of said District Court of the United States for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the following is a full, true and correct statement of all expenses, fees and charges earned by me in the preparation and certifi-

cation of the aforesaid Transcript of Record on Appeal, to-wit:

Appeal fee	$ 5.00
Clerk's fees for comparing transcript, 226 folios @ 05¢ per folio	11.30
Clerk's Certificate	.50
	$16.80

[133]

I do further certify that the Clerk's fees in the above itemized amount have been paid in full by the attorneys for Plaintiff and Appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court, in the City of Tacoma, in the Western District of Washington, this 11th day of December, 1939.

[Seal] ELMER DOVER,
Clerk,
By E. REDMAYNE,
Deputy. [134]

[Endorsed]: No. 9392. United States Circuit Court of Appeals for the Ninth Circuit. R. J. Dudley, Appellant, vs. Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, Appellees. Transcript of Record. Upon Ap-

peal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed December 13, 1939.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9392

R. J. DUDLEY,

Appellant,

vs.

HENRY A. SCANDRETT, WALTER J. CUMMINGS, and GEORGE I. HAIGHT, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation,

Appellees.

APPELLANT'S STATEMENT OF POINTS ON APPEAL

Appellant states the following points on which he intends to rely on appeal:

I.

Error of the trial court, duly excepted to by plaintiff, granting defendants' motion to dismiss

action and entering judgment thereon, as under the testimony the cause should have been submitted to the jury to determine as questions of fact, for the following reasons: (a) there was evidence of actionable negligence against the defendants that was the proximate cause of the injury to plaintiff; (b) that plaintiff did not assume the risk of his injury as a matter of law.

II.

Error of the trial court in striking and refusing to admit in evidence the following testimony:

Q. Had the Company, prior to the time you were injured, ever shipped any tools in your baggage car? A. Yes.

Q. What kind.

A. Cross-cut saws, axes and adzes.

Q. What, if any, protection was placed on the sharp ends of the adzes?

A. They usually had, I think a burlap wrapping around that.

Q. Would the points be protected?

A. Yes.

Q. In what way?

A. They usually had some protection of some small light wood over it.

Q. Did the Company always ship that kind of sharp tools with that protection, all shipments which you had prior to the time of the accident? A. Yes.

Mr. Laughon: I object to that, Your Honor, as immaterial; that is not proof of anything in

this case. There is no allegation in the complaint alleging this was a sharp edged tool like a saw or adze. * * *

The Court: I think that entire testimony, I will strike out any testimony in regard to the sharp edges of axes, adzes and saws until you show this was as sharp as an axe, adze or saw. * * *

The Court: Q. Take this small pocket knife; this one is flat as though it had been cut off sharp and you see it shows a sharpening of the edge? A. Yes.

Q. All right; what kind of edge did the disk have?

A. It had a sharp edge like that knife.

The Court: All right; go ahead.

Mr. Hanley: Q. Was there any covering on it at all? A. No.

Q. Now, I will ask the question, were sharp tools ever shipped in your baggage car?

A. Yes.

Mr. Laughon: I object; he answered before I could object, Your Honor.

The Court: I am not going to allow any evidence as to any instruments except as to this type. * * *

Mr. Hanley: An exception, if the Court please.

FRANK C. HANLEY
Attorney for plaintiff-appellant
407 Yeon Building
Portland, Oregon

Due service of the within Appellant's Statement of Points on Appeal is hereby accepted by certified copy, this 23rd day of December, 1939.

A. J. LAUGHON

Of Attorneys for defendants-appellees

[Endorsed]: Filed Dec. 28, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF PARTS OF RECORD FOR CONSIDERATION ON APPEAL

Comes now the Appellant and hereby designates parts of the record which he thinks necessary for consideration on appeal, to-wit:

1. Complaint—pages 1-5 Certified Transcript on Appeal.

2. Answer—pages 6-10 Certified Transcript on Appeal.

3. Judgment of Dismissal—pages 13-14 Certified Transcript on Appeal.

4. Notice of Appeal with date of filing—pages 15 Certified Transcript on Appeal.

5. Entire testimony of the plaintiff, R. J. Dudley—pages 7 to 50 inclusive and pages 61 and 62 Transcript of Evidence of the Court Reporter, denominated "Statement of Facts"—pages 22-65, 76-77 Certified Transcript on Appeal.

6. Entire testimony of the witness, William S. Johnson—pages 51 to 60 inclusive Transcript of

Evidence of the Court Reporter. denominated "Statement of Facts"—pages 66-75 Certified Transcript on Appeal.

7. Entire testimony of the witness, L. Dudley Long—pages 77 to 93 inclusive Transcript of Evidence of the Court Reporter, denominated "Statement of Facts"—pages 92-108 Certified Transcript on Appeal.

8. That part of the Transcript of Evidence of the Court Reporter, denominated "Statement of Facts" beginning with line 22 on page 107 thereof and ending with line 7 on page 108 thereof, the same being motion of counsel to dismiss the action —pages 122-123 Certified Transcript on Appeal.

9. The Court's decision on motion to dismiss and exception thereto, beginning with line 15 on page 109 of the Transcript of Evidence of the Court Reporter, denominated "Statement of Facts" and ending with line 3 on page 114 thereof.—pages 124-129 Certified Transcript on Appeal.

10. Appellant's Statement of Points on Appeal.

11. Appellant's Designation of Parts of Record for Consideration on Appeal.

FRANK C. HANLEY
Attorney for Appellant
407 Yeon Building
Portland, Oregon

Due service of the within Appellant's Designation of Parts of Record for Consideration on Ap-

peal is hereby accepted by certified copy, this 23rd day of December, 1939.

A. J. LAUGHON

Of attorneys for Appellees.

[Endorsed]: Filed Dec. 28, 1939. Paul P. O'Brien, Clerk.

No. 9392

In the United States Circuit Court of Appeals

For the Ninth Circuit 2

R. J. DUDLEY, *Appellant,*

vs.

HENRY A. SCANDRETT, WALTER J. CUMMINGS, and GEORGE I. HAIGHT, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, and CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a corporation,

Appellees.

BRIEF OF APPELLANT

Upon Appeal from the District Court of the United States for the Western District of Washington.
Southern Division.

FRANK C. HANLEY
Yeon Building
Portland, Oregon
Attorney for Appellant

STEVENS-NESS LAW PUB. CO., PORTLAND 89576

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STATUTES

No. 9392

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Appellees.

BRIEF OF APPELLANT

Upon Appeal from the District Court of the United States for the Western District of Washington.
Southern Division.

JURISDICTION

This action is of a civil nature under the provisions of the Federal Employers' Liability Act (35 Stat. 65; 45 U.S.C.A. 51-59) and between citizens of different states. It was commenced by appellant as plaintiff against the appellees as defendants by

filing a complaint and the issuance of summons in the District Court of the United States for the Western District of Washington Southern Division on May 21, 1938 (R. pp. 2-8). Thereafter and on July 20, 1938, defendants filed their answer to plaintiff's complaint (R. pp. 8-14).

The complaint discloses the following jurisdictional facts: (1) that defendants operate a common carrier by railroad in interstate commerce; that plaintiff on October 5, 1936, was in the employ of defendants as a train baggageman engaged in the performance of his duties as such at Tacoma, Washington, arranging space in the baggage car for the reception of express and train baggage matter which was being shipped and transported in interstate commerce from the State of Washington and into and across the State of Idaho to other States of the United States, and through the negligence of the defendants at said time and place plaintiff was injured (R. pp. 2-6); (2) that at the time of the commencement of this action plaintiff was a citizen and resident of the State of Washington and defendants were citizens and residents of the States of Illinois and Wisconsin, respectively, and that there is in the action a controversy which is wholly between citizens of different States which can be fully determined as between them; that the action is of a civil nature and the matter in dispute exceeds the sum of $3000.00 exclusive of interest and costs (R. p. 7), admitted by defendants' answer (R. p. 10).

The District Court of the United States for the Western District of Washington Southern Division had jurisdiction of this cause under the provisions of the Federal Employers' Liability Act, 35 Stat. 65; U. S. Code Ann., Title 45, Sections 51-59 and under the provisions of U. S. Code Ann., Title 28, Section 41.

This Court has jurisdiction to review by appeal the judgment of the District Court under the provisions of U. S. Code Ann., Title 28, Section 225.

STATEMENT OF THE CASE

Appellant in the employ of appellees, operators of an interstate railroad, instituted this action to recover the sum of $3420.00 special damages and general damages of $35000.00 for personal injuries he sustained on October 5, 1936, while engaged in the performance of his duties as train baggageman at Tacoma, Wash. in a certain car of appellees' which was a part of train No. 16, a passenger train destined to Chicago, Illinois. He reported for work about 7:30 P.M. as the train was due to leave Tacoma at 8:00 P.M. Before appellant reported for work appellees had placed in said car a certain smoke jack, property of the Railroad which it was shipping to Spokane, which was constructed of galvanized iron, one end of which was about 4 feet square and attached to this was a smoke stack circular in shape about 8 inches in diameter and 8

feet long, on the top of which was a cross-piece of the same material and dimensions; that the smoke jack was lying lengthwise in the end of the baggage car and had a number of other packages of company material and merchandise underneath it; that circling the stack of the smoke jack were 2 flat galvanized plates which were loose upon the stack and extended out from the surface about 10 inches and that the edges of same were sharp and likely to cut anyone handling the same, which fact the appellees knew but this condition was unknown to the appellant;

That while the appellant in the performance of his duties was arranging space in the baggage car for the reception of other train baggage and express matter, it became necessary for him to raise the smoke jack so that the stack was extending upward in the baggage car and while in the act of moving the packages which had been underneath the same, the smoke jack started to fall and in placing his arm against it to keep it from falling he came in contact with the sharp edge of one of the circular galvanized plates and received a cut on the wrist bone of his left arm which bled profusely and infected his blood so that he sustained a systemic blood poisoning of his entire system resulting in a permanent arthritic condition of his spinal column and his right and left arms and joints of his legs and knees, which prevented him from following his work as a train baggageman up to the present time with the excep-

tion of some work he did between February 26th and May 8th, 1937, as a train baggageman but on account of his physical condition was required to discontinue such work.

The negligence charged against appellees is: (a) appellees failed and neglected to wrap and protect the sharp edges of the galvanized circular plates extending from the stack of the smoke jack by covering them with burlap or other material so that appellant would not come in contact with same, which protection was the custom and practice adopted by appellees; (b) appellees failed to warn appellant of the dangerous and sharp edges of the galvanized plates prior to the time he was required to handle same.

Appellees admit appellant's employment and the existence of the smoke jack in the baggage car and that it fell and cut appellant on the wrist when he came in contact with it, and deny their negligence when appellant was damaged, and allege as defenses that appellant assumed the risk or danger of coming in contact with the sharp edges of the smoke jack, that his standing the same up against the side or end of the baggage car was the sole and proximate cause of his injury and damage, if any, and that he was guilty of sole negligence in moving the smoke jack.

The case was tried before the Court and a jury. At the close of appellant's evidence the trial judge

sustained a motion of appellees to dismiss the action on the ground that the proximate cause of appellant's injury was his act in putting the smoke jack up in a position where it would fall on him (R. pp. 98-99), to which ruling appellant excepted, which was allowed by the Court (R. p. 99), and judgment of dismissal with costs entered (R. pp. 14-15). From this judgment of dismissal appellant brings this appeal.

The undisputed testimony in this case as to how the accident happened was given by appellant (R. pp. 16-63-74), which will be referred to briefly as follows:

Appellant on Oct. 5, 1936, reported for work as train baggageman at the depot in Tacoma about 7:30 P.M. at which time it was dark, and went to the baggage car and started arranging it for receiving baggage. The car was 72 feet long, 42 feet allotted for express and 30 feet for train baggage. There was a door on both sides of the car about 6½ feet wide which slid back and when open was about 9 feet from the end of the door to the end of the car. There were guards on the interior of the car covering the door, consisting of steel metal construction, to protect the baggage from going against the door. The interior of the car was dark aluminum color, steel plate lined and had eight 25 watt lights on the ceiling in the center of the car and one light over each of the four doors. The interior of the car was about 9 feet high.

On getting in to the baggage car appellant found there were piled in front of the doorway some heavy boxes, a few gunny sacks with some kind of material in, a smoke-jack and other company material on the station side. He had to place the baggage car in order to receive some baggage and write the company material up as he had to make a report of it.

With reference to where the smoke-jack was, there were other material which he had to pick up consisting of boxes and material in the door. The door was open and the jack was to the right of the door on the station side near or against the wall on the floor and the sacks were in front of it. The closest end of the jack was about two feet from the doorway. At the foot of the door there were about eight or ten heavy boxes about 3 feet high and 18 inches wide, 2 feet high and a foot wide—of different sizes—that blocked the doorway. Between the doorway and the back end alongside of and under and around the stack part of the jack were about ten small packages, some of which were under the stack part of the jack. Appellant arranged them in the car, first moving the heavy boxes from the front of the car door to the opposite side of the car out of the doorway. He then moved some of the packages around the smoke-jack and placed them in different parts of the car where he knew they would be. Next he raised the jack. There were some packages underneath the smoke-jack which he had to get out. The smoke-jack was about 7 feet long.

There was a loose disk on the stove pipe part. There was a flange probably 19 or 20 inches across on the bottom that was loose just below the disk on the pipe. (Illustrating by an exhibit in court, appellant pointed to the stack, the disk or flange of the stack and the top which is called a "T".) He stated he never handled a smoke-jack before. He had seen them on a building or car. To his recollection none had ever been shipped before. The pipe on the part of the smoke-jack was about 8 inches across and the ~~width~~ disk extending out from the stack part was about 5 ~~feet~~ or 6 inches. The disk he was touching was loose on the pipe and was 10 ~~feet~~ or 12 inches from the floor. The edge of the top flange was straight and flat and stuck out and was sharp. He got the dimensions and description of the smoke-jack shortly after he was injured. The stack part of the jack was about 5½ feet long, the jack 7½ feet from top to bottom. The disk of the jack was loose and played up and down on the stack. The bottom disk did not have so much play—about 10 inches. He further testified:

"THE COURT: Just tell what you did with it.

A. There was packages in front of it, and there was packages underneath and around it. I had to move some of those packages, and there was some packages underneath it too. In order to get at the packagges I raised it up this way (indicating).

THE COURT: Did you lean it against the wall?

A. Yes.

Q. You left it there?

A. Yes.

MR. HANLEY: Q. How much time elapsed before it fell on you?

A. Probably half a minute.

Q. What were you doing at the time?

A. I was getting these packages out.

Q. Then what happened?

A. It started to move like that (indicating). I thought it was going to move— I am down on the floor getting the packages out from around it—— I thought it was moving and put out my arm to stop it and it struck me on the wrist.

Q. Which wrist?

A. The left wrist.

Q. Did it cut you?

A. Yes.

Q. What part of it cut you?

A. The disk.

Q. How do you know it was the disk?

A. I saw some blood on it.

Q. Did you notice the disk before?

A. No.

Q. Had you made an inspection before you handled it?

A. No.

Q. Did you know where it was going?

A. No.

Q. How did you find out where it was going?

A. I looked at the tag.

Q. Where was the tag?

A. Tied on the "T" end.

Q. How did you see it was on it?

A. When I raised it up from the floor I saw it and I looked at the tag. I saw the tag up there on the "T" end so I noticed it was going to Spokane."

(R. pp. 33-34.)

At the time appellant reported for work there were other articles besides company material in the

baggage car consisting of laundry bags, linen and company mail bags. Appellant had to sort the mail in the mail bags before the train left Tacoma. There was a truck load of passenger baggage to be loaded in the baggage car on the depot platform consisting of trunks, grips, suit cases, etc., by the station agent and had to be received by appellant before leaving Tacoma. Appellant further testified he did not inspect the smoke-jack before he handled it—he did not have time (R. p. 37). Appellant further testified:

> "Q. When the smoke jack struck your left wrist I think you testified, did it fall clear over?
> A. No.
> Q. What happened to it?
> A. I just kind of straightened it up.
> Q. How big was the cut on your wrist?
> A. It was to the bone.
> Q. Was there any blood?
> A. Yes."
> (R. p. 38.)

Appellant further testified the color of the smoke-jack was galvanized iron the same as the color of the interior of the car, the lighting condition of the car was poor. They were burning but not fully—probably a third capacity. They are lighted when the train is standing from storage battery and when train is running a dynamo underneath the car generates electricity and the lights are brighter (R. p. 39). It is usual for them to be brighter at the station when standing and loading baggage. Sta-

tion lights right by the door give about one-third more light. Appellant saw baggage and smoke-jack—that he stood it up and was not in the dark—knew what the objects were but did not have light enough to read the tag on the jack when he stood it up—he had to raise it up near the lights in order to read the tag as to its destination (R. p. 40).

Appellant stood the smoke-jack up because he wanted it out of the way. He then stooped down to do some other work and in about half a minute it fell toward him—put out his left arm to stop it and it cut him. All this time he was stooping and could see what the objects in front of him was. He thereafter showed his injured arm to conductor Johnson, at which time it was bleeding quite freely. He was thereafter treated by the Company physicians. He returned to work in February, 1937, and worked until about the 10th of May, 1937, and thereafter had to discontinue such work on account of his physical condition.

Appellant further testified that prior to the time he was injured the Company shipped cross-cut saws, axes and adzes in the baggage car. The sharp end of the adze was protected by burlap wrapping. Points would be protected usually with some small light wood over them. The sharp ends would not be exposed under any circumstances. The Company always shipped that kind of tools with protection prior to the time of the accident.

"MR. LAUGHON: I object to that, Your Honor, as immaterial * * *.

THE COURT: I think that entire testimony I will strike out—any testimony in regard to the sharp edges of axes, adzes and saws until you show what kind of an edge it was I will strike that part of the testimony."

Appellant further testified that he first examined the top disk shortly after it cut him. It had some blood on it. It was flat and loose and had a very sharp edge—so sharp he could cut himself if he touched it.

"Q. THE COURT: Take this small pocket knife—this one is flat as though it had been cut off sharp and you see it shows a sharpening of the edge?

A. Yes.

Q. All right; what kind of edge did the disk have?

A. It had a sharp edge like the knife.

Q. Was there any cover on it at all?

A. No.

Q. Now, I will ask the question, were sharp tools ever shipped in your baggage car?

A. Yes.

MR. LAUGHON: I object; he answered before I could object, Your Honor.

THE COURT: I am not going to allow any evidence as to instruments except as to this type, etc.

MR. HANLEY: An exception, if the Court please.

Q. Was there any covering of any kind on this disk?

A. No.

Q. Now, had you received any notice from the Milwaukee or any of its agents or employees

of the sharp edge being on this smoke-jack you have just testified about?

A. No."

(R. pp. 51-52.)

Appellant further testified he had not done any physical work since he left the railway and was not able to do any although he tried several times. At the time of the accident he was not wearing gloves. He would not advise a shipper to ship a smoke-jack in the same form—he thought it would be necessary that it be crated (R. p. 74).

Conductor W. S. Johnson testified relative to the interstate commerce in the train and that it was dark when he reported for work at 7:30 P.M.; that he first went to the baggage car after appellant showed him his injury; that he looked at the disk on the smoke-jack after he left Tacoma. He observed it was a raw edge of thin metal. It was loose on the pipe just enough so it could slide up and down; that he had never seen any smoke-jacks shipped in the baggage car before. When he first went in the car, which was after the accident, he didn't recall where the smoke-jack was but afterwards it was lying up out of the way over a pile of laundry so that nobody could accidentally get against it. He didn't observe the light on the baggage car but the same is brighter when the car is moving. The smoke-jack was made of light metal and new. His recollection was the sleeve around it was loose and that it was a rough edge of metal. He

didn't think it was milled out like a knife—it was just a raw edge (R. pp. 63-74).

SPECIFICATION OF ERRORS

I.

Error of the trial court, duly excepted to by appellant, granting appellees' motion to dismiss action and entering judgment thereon, as under the testimony the cause should have been submitted to the jury to determine as questions of fact, for the following reasons: (a) there was evidence of actionable negligence against the appellees that was the proximate cause of the injury to appellant; (b) that appellant did not assume the risk of his injury as a matter of law.

At the close of appellant's testimony the following motion was made by counsel for appellees:

> "MR. LAUGHON: I make a motion to dismiss the action brought by the plaintiff upon the ground, first, that the plaintiff has failed to show actionable negligence against the defendants or any of them that was or could be the proximate cause of the injury to the plaintiff, if any; the motion is based on the further ground, that it appears from the testimony of the plaintiff, uncontroverted in the case and indisputed, that the injury, if any, that the plaintiff received, was due to the risks and dangers incidental to his employment at that time, which were open and apparent, which were known and appreciated by the plaintiff or could have been known at the time of the injury.

Now, I make the motion on the further ground, that under the evidence of this particular case, the plaintiff's acts, what he did with reference to this smoke-jack, was the sole and proximate cause of any injury received.

THE COURT: The defendants' motion to dismiss will be granted and the case will be dismissed."

(R. p. 99.)

"MR. HANLEY: May I automatically be granted an exception under the Court's ruling?

THE COURT: Yes. Call in the jury."

(R. p. 99.)

II.

Error of the trial court in striking and refusing to admit in evidence the following testimony:

"Q. Had the Company, prior to the time you were injured, ever shipped any tools in your baggage car?

A. Yes.

Q. What kind?

A. Cross-cut saws, axes and adzes.

Q. What, if any, protection was placed on the sharp ends of the adzes?

A. They usually had, I think a burlap wrapping around that.

Q. Would the points be protected?

A. Yes.

Q. In what way?

A. They usually had some protection of some small light wood over it.

Q. Did the Company always ship that kind of sharp tools with that protection, all shipments which you had prior to the time of the accident?

A. Yes.

MR. LAUGHON: I object to that, Your Honor, as immaterial; that is not proof of any-

thing in this case. There is no allegation in the complaint alleging this was a sharp-edged tool like a saw or adze. * * *

THE COURT: I think that entire testimony, I will strike out any testimony in regard to the sharp edges of axes, adzes and saws until you show this was as sharp as an axe, adze or saw * * *. (R. pp. 47-48-49.)

THE COURT: Take this small pocket knife; this one is flat as though it had been cut off sharp and you see it shows a sharpening of the edge?

A. Yes.

Q. All right; what kind of edge did the disk have?

A. It had a sharp edge like that knife.

THE COURT: All right; go ahead.

MR. HANLEY: Q. Was there any covering on it at all?

A. No.

Q. Now, I will ask the question, were sharp tools ever shipped in your baggage car?

A. Yes.

MR. LAUGHON: I object; he answered before I could object, Your Honor.

THE COURT: I am not going to allow any evidence as to any instruments except as to this type * * *.

MR. HANLEY: An exception, if the Court please." (R. pp. 51-52.)

ARGUMENT

Actionable Negligence and Proximate Cause

The first specification of error hereinbefore set out (also R. pp. 102-103) is that the Court should not have granted the motion to dismiss as under the testimony the cause should have been submitted to

the jury as a question of fact for the reason (A) there was evidence of actional negligence of appellees that was the proximate cause of appellant's injury; (B) that appellant did not assume the risk of his injury as a matter of law. The same will be discussed in their order:

(A) 1. *There was sufficient evidence of Appellees' negligence to present an issue of fact for determination of the jury.*

The grounds of negligence relied upon by appellant were: (a) appellees failed and neglected to wrap and protect the sharp edges of galvanized circular plates extending from stack of smoke-jack by covering them with burlap or other material; (b) appellees failed to warn appellant of the dangerous and sharp edges of the galvanized plates prior to the time he was required to handle same.

On these grounds of negligence the evidence clearly shows that appellant was working in semi-darkness with lights burning about one-third capacity (R. p. 39) in baggage car; that he had to move the smoke-jack to get other packages from underenath the stack and arrange them in the car so as to receive other on-coming baggage; that he had never handled a smoke-jack before (R. pp. 37-38); that he set it up in the side of the car and it stood there about half a minute (R. p. 33) and while he was stooping over getting other packages it started to fall. He threw his left arm out to stop

it and the disk on the stack struck him on the wrist and cut him. He examined it after he had received first aid (R. p. 49). The disk was flat, had a very sharp edge, was made of corrugated iron. Its edge was as sharp as a knife (R. p. 51).

> "Q. Was there any covering on it at all?
> A. No.
> Q. Was there any covering of any kind on the disk?
> A. No.
> Q. Now, had you received any notice from the Milwaukee or any of its agents or employees of the sharp edge being on the smoke-jack you have testified to?
> A. No." (R. pp. 51-52.)

Appellant further testified he would not advise a private shipper to ship the smoke-jack as it was but thought it would be necessary that it be crated; that all of the material he testified about being in the baggage car was company material (R. p. 74).

The evidence further showed that the interior of the baggage car was a dark aluminum color (R. p. 22) and that the smoke-jack was the regular color of galvanized iron and about the same color as the interior of the baggage car (R. p. 38). This would make it more difficult to see the disk on such jack. The company prior to the time appellant was injured shipped cross-cut saws, axes and adzes in the baggage car. The sharp end of the adzes were protected by burlap wrapping—points were protected with some light wood over them, sharp ends would

not be exposed under any circumstances. The company always shipped that kind of sharp tools with protection prior to the time of the accident (R. pp. 47-48). (Stricken in part by Court (R. 49)).

In support of the foregoing testimony constituting actionable negligence against appellees requiring submission for determination of the jury we cite the following authorities:

Crane vs. Oliver Chilled Plow Works, 280 Fed. 954 (9th Cir.). Action by Crane against Pacific Steamship Company and Oliver Chilled Plow Works to recover damages for personal injuries sustained by plaintiff while in the employ of Steamship Company from a judgment dismissing the action as against the Oliver Chilled Plow Works in that its demurrer to complaint on the ground that it did not state facts sufficient to constitute a cause of action against it was sustained, plaintiff brings error. It is alleged in the complaint that Oliver Chilled Plow Works was shipper of a potato digger on steamship company's vessel "City of Topeka"; that said defendant placed the potato digger on the wharf when the ship was taking on a cargo of miscellaneous freight by ship's appliances; that the potato digger was constructed with knives and other sharp parts which were cocealed from view and were not observable; that in shipping the potato digger said defendant had negligently and carelessly failed to remove the knives and sharp parts or box or cover or shield the same so that they would not have ex-

posed persons engaged in handling the machine to the danger of cutting their hands while carrying the same in the hold of the ship, all of which was well known to said defendant by properly inspecting the machine before shipment, and that plaintiff was not informed of the danger; that while plaintiff was engaged in carrying the potato digger across the floor of the hold of the vessel as he was required to do, the fingers of his left hand became caught in the knives and other sharp parts of the potato digger causing him to lose two of his fingers to his damage, etc. HELD that the complaint stated a cause of action and that the intervention of the failure of the carrier to warn its employees of the danger of handling the machine shipped by the defendant as an independent cause of employee's injury was a matter of defense and that the question of proximate cause of the injury was for the jury. Citing Milwaukee, etc. Ry. Co. vs. Kellogg, 94 U.S. 469; 24 Law Ed. 256. Judgment reversed with directions to District Court to overrule demurrer.

The Richelieu, 27 Fed. (2d) 960, at p. 968. (3) The present situation is governed by the well-established principle that one who delivers goods to a carrier for shipment, whether he be the manufacturer thereof or not, is obligated, if the goods are known to him to be of an inherently dangerous character, or if he, tested by the standard of the average prudent man, ought to have had such knowledge, to warn the carrier of such inherent danger, unless the

carrier itself knew, or might, by the exercise of ordinary care, have known, of the same. The fact that the shipper is also the manufacturer of the goods does not, in and of itself, impose a peculiar and greater obligation upon him, but he is governed by the principle just stated (authorities). This decision was modified in 48 Fed. (2d) 497 but only as to liability of individual parties.

Northern Pacific Railway Company vs. Berven, 73 Fed. (2d) 687 (9th Cir.). Berven, a car repairer in the employ of Railway Company, was injured at the shops of Railway Company at South Tacoma, Wash., by tripping and falling on a platform, and recovered a judgment. Negligence charged that appellant failed to provide a reasonably safe place to work or a safe footing on a platform and permitted the spikes that held a piece of iron flat to the surface to become loose and the end thereof to curl up thus obstructing the platform and footpath, and that appellant failed to warn appellee of the dangerous condition. Appellant denied the negligence and pleaded assumption of risk. The appellee in this case testified he did not see the strip of iron before he fell and had never seen it before. The court in affirming the judgment HELD that the question of negligence was properly submitted to the jury, adopting the rule laid down in the case of N.Y. C. & St. L. R. Co. vs. Boulden, C.C.A. 63 Fed. (2d) 917, 920, which states the rule to be: "Unless the facts be inconsistent with the existence of negligence

and present a situation so plain that intelligent men would draw the same conclusion, that is to say, that appellant was not guilty of negligence, then it must be conceded that the question of appellant's negligence was properly submitted to the jury and that in that event we are bound by the verdict as to the existence of negligence", and further that the question of proximate cause and assumption of risk under the evidence were jury fact questions.

New York C. & S. R. L. R. Co. vs. Boulden, 63 Fed. (2d) 917, Certiorari denied, 77 L. Ed. 1498. Appellee, a conductor, was alighting from a train in daylight on to a cinder platform at Swayzee and his left foot struck a post protruding above the surface estimated by witnesses from one to seven inches, and he was caused to fall and was injured. Negligence assigned was permitting post to protrude above the cinders. Appellee testified that prior to alighting from the train he was looking ahead but did not look down at the platform other than to glance at it as he was stepping off, and after he fell he looked and saw the post and its dimensions; that previously he had known nothing of the post and had never seen it, although in twenty-six years' service he had stoppel at this station platform about fifty times and had gotten off at or in the neighborhood of the post. Other evidence was to the effect that he was on the platform more frequently. Appellee recovered a judgment and the Court in sustaining same HELD:

"We are convinced that the court properly submitted the question of appellant's negligence to the jury. The projection of the post above the cinders was in no respect necessary to the performance of appellant's or appellee's legitimate duties, and we think it cannot be said that intelligent men would at once agree that it was not negligence on appellant's part to permit said post to extend above the surface of the platform at any place where persons upon the trains were accustomed and impliedly invited to alight. It may be conceded, as appellant suggests, that it should not be required to maintain as expensive a platform in a small town as in a large city, but that fact cannot excuse it from liability for maintaining the less expensive platform in a negligent manner. It may reasonably be inferred from the evidence that the condition of the post at the time of the accident was largely caused by rain washing the cinders from around the post through the joint of the girders, and this condition was permitted to remain the same for one year immediately preceding the accident. These facts constitute substantial evidence in support of the verdict that appellant was guilty of negligence."

McGinty vs. Pennsylvania R. R. Co., 6 Fed. 514, was an action for injuries sustained by employee of Coal Company tripping over unattached rails when moving loaded coal cars. Whether railroad, knowing resultant menace to safety of plaintiff, left rails in their dangerous position an unnecessary and unreasonable length of time and whether such act constituted negligence which was the direct and proximate cause of plaintiff's injuries, HELD for jury.

B. & O. R. Co. vs. Fletcher (C.C.A.), 300 Fed. 318. Certiorari denied 69 Law Ed. 468. Plaintiff was working for defendant as a brakeman in defendant's switch yards and while passing a footpath in the performance of his duties stepped on a rusty hoop and fell into some moving cars and his foot was crushed. Negligence charged was failure to maintain a reasonably safe place to work which consisted of obstructing the footpath with the hoop. Plaintiff recovered a judgment. Defendant assigned as error failure of the Court to direct a verdict on the ground there was no evidence of negligence. The Court HELD (p. 320):

> "The rusty condition of the hoop justified a submission to the jury of the question whether or not defendant had actual notice, or in the exercise of due care should have known in sufficient time to remove it, that the hoop was improperly there and whether or not because of its presence, the place was reasonably safe for its employees * * *. The Court properly denied defendant's motion for a directed verdict." Judgment affirmed.

Cincinnati N. O. & T. P. Ry. Co. vs. Davis, 293 Fed. 481. Plaintiff, a brakeman, was injured while in the employ of defendant. Negligence charged was (1) throwing and distributing cross-ties promiscuously along the track and in such near proximity thereto as to menace the safety of plaintiff in the discharge of his duty, and (2) failing to instruct plaintiff on his duty of how to make a switch. Upon trial there was a judgment for plaintiff. Defend-

ant claimed error on failure of the trial court to direct a verdict on the ground there was no negligence shown. The Court HELD, p. 484:

> "Under the facts and circumstances disclosed by the evidence the Court did not err in submitting to the jury the question of negligence on the part of the Railway Company in distributing these ties along its track or so near thereto as to increase the hazard of employees." Judgment affirmed.

Lancaster vs. Fitch (Tex. App.), 239 S.W. 256, 246 S.W. 1015. Certiorari denied, 67 L. Ed. 1216. Plaintiff brought action to recover damages for loss of his right leg crushed by movement of train while in discharge of his duties as a brakeman, in between two cars while attempting to uncouple them. It appeared that while thus employed plaintiff's shoe was caught on a spike that stuck up or protruded above the surface of the ties and plaintiff was thereby prevented from getting entirely out between the cars after the train began to move and was knocked down, the wheels of the car running over his leg. The Court HELD question of negligence of defendant in having the spike protruding above the ties was for the jury. Judgment for plaintiff affirmed.

Chicago, M. & St. P. R. vs. Coogan, 271 U.S. 472; 70 L. Ed. 1041, 1044, the Court held that a strip of pipe 15 feet in length which had been loosened and bent 3 or 4 inches toward the rail and upward, leaving a space four inches between it and the ties, was

clearly a breach of defendant's duty constituting negligence, but that there was no evidence that deceased caught his foot in same and for this reason the judgment was reversed.

(A) 2. Proximate cause of an injury is ordinarily a question of fact for the jury to be determined in view of the circumstances of fact attending it. It is not a question of science or legal knowledge.

Mlwaukee & St. P. Ry. Co. vs. Kellogg, 94 U.S. 469; 24 Law Ed. 256. Mr. Justice Strong delivering the opinion of the Court on proximate cause, said (94 U.S. on p. 474; 24 Law Ed. 259):

> "The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft cited case of the squib thrown in the market place. Scott v. Shepherd (Squib case), 2 W. Bl. 892. The question always is: was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the force constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held, that in

> order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

Davis vs. Wolf, 263 U.S. 239; 68 Law Ed. 284. In freight conductor's action for injuries sustained when thrown from car by a sudden, violent jerk while standing on sill step holding to a grab iron, question of whether the defective condition of the grab iron was the proximate cause of the accident was for the jury where there was evidence tending to show that the grab iron was defective.

Baltimore & O. R. Co. vs. Tittle, 4 Fed. (2d) 818. Certiorari denied 70 Law Ed. 410. In an action for injuries to switchman sustained when knuckle of coupler fell on switchman after he had pulled out knuckle pin to loosen knuckle, whether the defective knuckle or switchman's negligence in removal of pin with knowledge of defect was proximate cause of injury HELD question for the jury.

Hines vs. Smith, 275 Fed. 766. In an action for death of a fireman struck by a locomotive while operating switches at the round-house whether defective automatic bell ringer was proximate cause of injury HELD for the jury.

Erie R. R. Co. vs. Schleenbaker, 257 Fed. 667. Certiorari denied, 63 Law Ed. 1197. In an action

by a conductor injured when he missed the grab iron on the caboose from which the rear lights had been removed, and fell under the following car on which the caboose lights had been placed and which was the rear of the train, because it had no draw bar or coupler at its rear end, such hauling of the crippled car being unlawful and constituting negligence, question of whether the transportation of the defective car was the proximate cause of the conductor's injury HELD for the jury.

Erie R. R. Co. vs. White, 187 Fed. 556. In an action against railroad company for the death of an employee who was killed while negligently walking between cars in a moving train by having his foot caught because of the defective blocking of a guard rail, the question whether the proximate cause of the injury was the negligence of deceased in walking between the cars or the defective blocking HELD properly submitted to the jury under the evidence.

Donegan vs. Baltimore, etc. O. R. Co., 165 Fed. 869. Plaintiff, a brakeman on freight train, was directed to cut off two rear cars while train was moving slowly and before it reached a certain switch. The automatic coupler on one of the cars was broken and plaintiff went between the cars and attempted to pull the pin by hand, but not succeeding, started out, when his foot caught in an unblocked switch frog and he was injured. In an action to recover for the injury it was HELD that the question whether the failure of defendant to

have the car properly equipped was the proximate cause of the injury so as to render it liable therefor, was, under the evidence, one of fact for the jury and that it was error for the Court to direct a verdict for defendant.

Roberts Fed. Liability of Carriers, Vol. 2, Sec. 876, states the following rule:

> "Where * * * there is any evidence * * * in actions under the Federal Employers' Liability Act tending to raise an issue of fact as to the casual relation between the injuries sued upon, and the want of care upon either party, the question is for the jury",

citing Minn., St. P. & Soux St. Marie v. Groneau, 269 U.S. 406; 70 L. Ed. 335; Louisville & N. R. Co. v. Layton, 243 U.S. 617, 61 L. Ed. 931; Dahlen v. Hines, 275 Fed. 817.

(A) 3. If the occurrence of the intervening cause might reasonably have been anticipated, such intervening cause will not interrupt the connection between the original cause (proximate cause) and the injury.

The above general rule is laid down in 45 C. J. p. 934.

Crane vs. Oliver Chilled Plow Works, 280 Fed. 954 (9th Cir.) supra, HELD in passing on the sufficiency of the complaint that the negligence of a shipper in delivering for shipment a machine on

which there were concealed knives not guarded to protect those who handled the machine, without warning to the carrier of the character of the shipment, was the proximate cause of the injury to an employee of the carrier while handling the shipment, and that the intervention of a failure of the carrier to warn its employees of the danger of handling the machine shipped by defendant as an independent cause of the employee's injury while handling the machine was a matter of defense.

Carroll vs. Central Counties Gas Co., 273 Pac. 875 (Cal.). In an action for damages for death of occupant of automobile which, when driven off bridge, fell upon gas pipe causing it to break and gas therein to be allegedly thrown upon occupants of automobile, instruction wherein trial court delivered as a matter of law that the act of the driver of the automobile was the intervening act of a third party HELD erroneous as invading the province of jury and to require a reversal where evidence was conflicting.

Pool vs. Tilford, 99 Ore. 585; 195 Pac. 1114. In an action by an elevator man who in the dark fell down an elevator shaft, the car having been moved in his absence, the question of whether the master's negligence in failing to put a head lock on the door so as to prevent unauthorized persons from reaching the elevator and moving it was the proximate cause of injury HELD one for the jury.

Teasdale vs. Beacon Oil Co., Inc., 164 N.E. 612 (Mass.). Whether negligence of a filling station attendant in jerking handle of gas pump causing gasoline to spill over the automobile and clothes of occupant was the proximate cause of burning of occupant after driver of car negligently cranked it with coil box uncovered leaving spark exposed HELD question for jury in action for injuries as intervening act of third person which contributes condition necessary to injurious effect of original negligence will not excuse first wrongdoer if such intervening act could have been foreseen.

Referring to the Court's decision (R. pp. 94-99), the Court speculates on p. 96 stating that "many causes might have intervened to cause the smoke-jack to fall; it might have been that he pulled something from in back of it or placed something right under the stack, or that it may have been he placed it insecurely against the wall; in other words, we have one of three or four causes that might have caused it".

A review of the testimony we think will convince this Court that there is no evidence on any of these theories of the trial judge except that appellant's standing the smoke-jack up, if he did so insecurely, would have been a question for the jury as to whether or not in so doing he was guilty of contributory negligence, which under the Federal Employers' Liability Act, only goes to the mitigation

of damages if it proximately contributed to appellant's injury due to negligence of appellees. (Sec. 3, Federal Employers' Liability Act, 35 Stat. 65; 45 U. S. C. A. 51-59). See also Roberts Federal Liability of Carriers, Vol. 2, pars. 849-868).

The Court further stated in its opinion (R. p. 97): "And there is no cause that is traceable to the employer, but, even if we assume that the presence of this sharp instrument may have been the cause, we have several other causes and, under the authorities of these two cases, a jury would have to speculate as to which cause was the proximate cause of the injury, but I will go further and say, if the sole cause of the injury was, as alleged in the complaint, the coming in contact of plaintiff's wrist with the smoke-jack and that occurred after the plaintiff had placed it in a position, and the only position in which it could fall and hurt him, that that was the proximate cause of the injury".

It will be noted from this reasoning of the trial judge that he entirely disregarded the grounds of negligence as alleged in plaintiff's complaint, namely, the exposure of the sharp edges of the disks without protecting them, and failure to warn appellant of their danger, and the evidence hereinbefore quoted which clearly sustains by substantial proof such grounds of negligence.

The Court further in its reasoning above quoted after stating three or four presumptive causes, de-

cides as a matter of the law the question of proximate cause.

A review of the foregoing testimony and the decisions hereinbefore cited, a majority of which were actions under the Federal Employers' Liability law, we feel should convince this Court that there was sufficient evidence of actionable negligence in the case at bar and that such evidence was the proximate cause of appellant's injury, to have submitted such questions to the jury. We do not believe that in the state of the record in this case that the Court can say that reasonable minds would not differ on the testimony and the inferences to be drawn therefrom.

ASSUMPTION OF RISK

(B) *Appellant did not assume the risk of his injury as a matter of law.*

The Federal courts have uniformly held that an employee does not assume the risks arising from the negligent acts of his employer of which he has no knowledge unless the employer's failure of duty and the danger arising therefrom is so plainly observable that he may have been presumed to have known of and appreciated the same. The burden of proof of assumption of risk is on the employer and where the facts are in dispute or are such that reasonable minds would differ thereon, the question of assumption of risk is for the jury.

Chicago, R. I. P. R. Co. vs. Ward, 64 Law Ed. 430.

Renn vs. Seaboard A. L. R. Co., 60 Law Ed. 1006.

Chesapeake & O. R. Co. vs. DeAtley, 60 Law Ed. 1016.

Kanawha & M. R. Co. vs. Kerse, Adm., 60 Law Ed. 448.

Gilla Valley G. & N. R. Co. vs. Hall, 58 Law Ed. 521.

Tex. & Pac. Ry. Co. vs. Harvey, 57 Law Ed. 852.

Northwestern Pac. R. Co. vs. Fiedler, 52 Fed. (2d) 400.

N. Y. Central vs. Boulden, 63 Fed. (2d) 917. Certiorari denied 77 L. Ed. 1498.

Northern Pac. Ry. vs. Berven, 73 Fed. (2d) 685 (9th Cir.).

C. N. O. & T. P. Ry. Co. vs. Thompson (C.C. A.), 236 Fed. 1

Grey vs Davis (C.C.A.), 294 Fed. 57.

Lancaster vs. Fitch (Tex.), 239 S.W. 265; 246 S.W. 1015. Certiorari denied, 67 Law Ed. 1216.

The rule of law on assumption of risk which is laid down in all of the foregoing authorities is well stated in Chicago R. I. P. R. Co. vs. Ward (64 Law Ed. 430), which was an action under the Federal Employers' Liability Act wherein an error was claimed on account of the failure of the court to direct a verdict on the ground that plaintiff assumed the risk. The court stated as follows:

"As to the nature of the risk assumed by an employee in actions brought under the Employers'

> Liability Act, we took occasion to say in Chesapeake & O. R. Co. vs. DeAtley, 241 U.S. 310, 315; 60 L. Ed. 1016, 1020, 36 Sup. Ct. Rep. 564: 'According to our decisions, the settled rule is not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them'."

It was further held that under the facts assumption of risk was a question of fact for the jury. The above rule has been adhered to and applied in all of the cases cited.

Renn vs. Seaboard A. L. R. Co., 86 S.E. 964; 60 L. Ed. 1006. Plaintiff sought damages for personal injuries against defendant. Negligence charged was that defendant negligently caused, permitted and allowed water to be poured or spilled upon a footpath and freeze, causing ice to be formed which became covered with snow, and negligently allowed it to remain thereon, causing a dangerous condition, and negligently failed to warn plaintiff of same. Plaintiff while using the footpath slipped thereon and was injured and recovered a judgment. Error was assigned on failure to grant a non-suit on the ground that there was no evidence of actionable negligence and that the evidence conclusively

established assumption of risk. Judgment affirmed. In reviewing the case the U. S. Supreme Court, speaking through Justice Van Devanter, said:

> "Error is assigned upon a refusal to instruct the jury, as a matter of law, that there was no evidence of actionable negligence on the part of the defendant, and that the evidence conclusively established an assumption by the plaintiff of the risk resulting in his injury. Both courts, trial and appellate, held against the defendant upon these points. They involve an appreciation of all the evidence and the inferences which admissibly might be drawn therefrom; and it suffices to say that we find no such clear or certain error as would justify disturbing the concurring conclusions of the two courts upon these questions. Great Northern R. Co. vs. Knapp, 240 U. S. 464; ante, 745, 36 S. Ct. Rep. 399; Baugham v. N. P., P. & N. Co., decided this day (241 U.S. 237, ante, 977, 36 C. T. Rep. 592)."

N. Y. Central vs. Boulden, 63 Fed. (2d) 917. Certiorari denied, 77 L. Ed. 1498. Appellee, a conductor, was alighting from a train in daylight on to a cinder platform at Swayzee and his left foot struck a post protruding above the surface estimated by witnesses from 1 to 7 inches, and he was caused to fall and was injured. Negligence assigned was permitting post to protrude above the cinders. In passing on the question of assumption of risk the Court held:

> "The existence of the condition in which the post was found at the time of the accident certainly was not necessary to the performance of appellee's duties and if he is to be held as having

> assumed the risk pertaining to it, it must be by reason of the fact that he had knowledge of its presence or by the exercise of reasonable diligence could have discovered it. * * * In approaching the station appellee was charged with knowledge of what he saw or could have seen had he looked. The law did not require him to look in any particular direction at any particular time, nor to keep his eyes riveted on any particular spot, but he was required to observe all places where danger was likely to be, and in doing this he was bound to exercise that care which an ordinarily prudent person would have exercised under all of the circumstances. * * * Whether under all of the circumstances the protruding post constituted a risk normally incident to appellee's employment is a question concerning which we feel quite sure that intelligent men might disagree and it was properly submitted to the jury."

Northern Pacific Railway Co. vs. Berven, 73 Fed. (2d) 685 (9th Cir.). Berven, a car repairer in the employ of Railway Company, was injured at the shops of Railway Company at South Tacoma, Washington, by tripping and falling on a platform, and recovered a judgment. Negligence charged that appellant failed to provide a reasonably safe place to work or a safe footing on its platform and permitted the spikes that held a piece of iron flat to the surface to become loose and the ends thereof to curl up thus obstructing the platform and footpath, and that appellant failed to warn appellee of the dangerous condition. Appellant denied negligence and pleaded assumption of risk. In passing on the question of assumption of risk the Court

HELD quoting from opinion page 689:

"The crossing where the accident occurred was used by many persons daily, and there is testimony that the piece of iron over which appellee tripped and fell has been protruding in the manner described for several weeks. However, appellee testified that he had not used the crossing for a couple of weeks before that day because he had had no occasion to go to the material shed for lumber. So far as the record discloses, his work was confined to the wheelhouse, and he was not required to move wheels from place to place. He testified that he 'never rolled any wheels'. He did not use the crossing when going to the material shed that day, but returned on it because it was easier to do so with the lumber he was then carrying. He admitted that the piece of iron was in plain view, but said that he did not notice it before he fell and had never seen it before. He knew that wide strips of iron are used on the platform to facilitate the rolling of the wheels thereon, and that the weight of the wheels and the rotten condition of the wood in the platforms cause the iron strips to curl up at the ends, but said that he had never seen small (narrow) strips like the one over which he tripped.

"Under these circumstances, it seems to us that the question of assumption of risk, that is, whether the piece of iron over which appellee tripped and fell constituted a risk normally incident to his employment, or an obvious condition which he should have observed, was a question upon which intelligent men might disagree, and, accordingly, it presented a question of fact for the jury to determine. The court did not err, therefore, in submitting the question to the jury.

"We find no reversible error in the record, and the judgment is therefore affirmed."

Cincinnati N. O. & T. P. Ry. vs. Thompson (C.C. A.), 236 Fed. 1, was an action under the Federal Employers' Liability Act by plaintiff, a brakeman injured while alighting from a moving train by stepping on a large piece of slag. Error was assigned by defendant on refusal of the court to direct a verdict for it on the ground that plaintiff assumed the risk. The court, in passing on the case, held that although plaintiff knew there were small pieces of slag on the roadbed, that he did not as a matter of law assume the risk of injury when he stepped on a larger piece of slag for the danger therefrom was substantially greater than from the smaller pieces and that the doctrine of assumption of risk necessitated a knowledge of the conditions which can be gained by observation, and the fact that plaintiff knew there were smaller pieces of slag thereon, it could not be inferred therefrom that he had knowledge of the larger pieces of slag, and that the case under the evidence presented a question of fact for the jury as to whether or not plaintiff assumed the risk. *It was further held that the fact that he might have seen the slag before he alighted from the train did not put into operation the doctrine of assumption of risk but effected the issue of contributory negligence only.*

Lancaster vs. Fitch, 239 S.W. 265, 246 S.W. 1015. Certiorari denied, 67 Law Ed. 1216, was an action under the Federal Employers' Liability Act by plaintiff to recover damages for loss of right leg which

was crushed by movement of the train while he was in the discharge of his duties as a brakeman between two cars attempting to uncouple them. It appeared that while he was thus employed his shoe caught on a spike that stuck up or protruded above the surface of the ties and that he was prevented from getting entirely out from between the cars after the train began to move and was knocked down, the wheels of the car running over his leg. It was held that the question of defendant's negligence in having the spike protruding above the ties as well as the question of plaintiff's assumption of risk of injury was for the jury and judgment for plaintiff was affirmed.

We call the question of assumption of risk to the Court's attention because it was one of appellees' grounds for dismissal of this cause that was not passed upon by trial judge. In the case at bar appellant could not assume the risk of injury as a matter of law as the undisputed testimony is to the effect that he did not know of the dangerous condition and sharp edges of the disk on the smoke-jack and had not been warned thereof prior to his injury. The fact that he did not see the sharp edges of the disk on the smoke-jack before the same struck him we think should be directed to the partial defense of contributory negligence as pointed out in Cincinnati, etc. vs. Thompson, *supra,* but should the doctrine of assumption of risk apply, the most that could be claimed for it is that it was a question of

fact for the jury.

As stated in New York Central vs. Boulden, *supra,* the law does not require appellee to look in any particular direction at any particular time nor keep his eyes riveted on any particular spot, but he is required to exercise care of an ordinary prudent person to discover danger. This same doctrine was applied in the case of Northern Pacific Railway Co. vs. Berven, *supra,* by this Court.

Under the facts in the instant case in keeping with the foregoing decisions we submit that the appellant did not assume the risk of injury as a matter of law and that the questions on assumption of risk, if any were involved, were wholly questions of fact for the determination of the jury.

STRIKING AND REFUSING TO ADMIT TESTIMONY

In the second specification of error set out in this brief page 15 (also R. pp. 103-104), it is appellant's position that this testimony relative to the protection afforded by the Company on sharp tools which had been theretofore shipped was clearly admissible and should not have been stricken out by the Court.

ARGUMENT

Appellant pleaded in his complaint the following ground of negligence: "(a) defendants carelessly and negligently failed and neglected to wrap and protect the aforesaid sharp edges of said galvanized circular plates extending from the stack of said smoke-jack by covering the same with burlap or other material so that plaintiff and defendants' other employees handling said smoke-jack would not come in contact with said sharp edges thereof, *which wrapping of said sharp edges of said circular plates on smoke-jacks when shipping or about to ship same was the custom and practice adopted by and known to defendants*".

It is appellant's position that this pleading is broad enough to admit the testimony regarding cross-cut saws, axes and adzes and that they were protected on the sharp ends of the adzes by wrapping them with burlap and that the saw points were protected with some light wood over them. Appellant testified that sharp tools of that nature when same were being shipped prior to the time of his accident always had such protection. (R. pp. 47-48-49.)

It is the general rule as stated in 45 C. J. p. 1241, Par. 803:

> "As a general rule evidence of the custom, usage and practice, if any, generally followed without accident or injury by others in the same situation or occupation as to the doing of a particu-

lar act or the use of a particular agency or method is competent on the question of whether or not a person whose negligence is an issue in an action to recover damages was in the exercise of due care in doing such act or employing such agency or method, or in the failure to do so provided such general custom or usage is so related in time and circumstances to the act or omission in question as to throw light thereon * * *". Citing in Note No. 6 numerous authorities of Federal and State Courts.

Appellant therefore urges under the general rule that testimony given as hereinbefore set out should not have been stricken by the Court and the further offer of the same proof should have been admitted.

CONCLUSION

We submit that prejudicial error was committed by the trial court in dismissing the within cause and on striking testimony and rejecting it, and that the judgment should be reversed and the case remanded for re-trial.

Respectfully submitted,

FRANK C. HANLEY,
Attorney for Appellant.
Yeon Building,
Portland, Oregon.

NO. 9392

In the

United States
Circuit Court of Appeals

For the Ninth Circuit

R. J. DUDLEY,

Appellant,

vs.

HENRY A .SCANDRETT, WALTER J. CUMMINGS and GEORGE I. HAIGHT, Trustees of CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a corporation, and CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a corporation,

Appellees.

BRIEF OF APPELLEES

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

J. N. DAVIS,
THOS. H. MAGUIRE,
A. J. LAUGHON,
608 White Bldg., Seattle, Wn.

ROBERT B. ABEL,
Perkins Bldg., Tacoma, Wn.

Attorneys for Appellees.

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BRIEF OF APPELLEES

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

This action was brought under the federal Employers' Liability Act upon an alleged cause of action that accrued on October 5, 1936. At the conclusion of the plaintiff's case the Court sustained defendant's motion for involuntary dismissal and on August 8, 1939, final judgment of dismissal was signed

and filed in the cause. (Tr. pp. 14, 15.) Notice of Appeal from the judgment of dismissal was filed November 3, 1939. (Tr. p. 16.)

Appellant's statement of the case (Appellant's brief pp. 3-14) is unduly extensive and in many instances conflicting and unintelligible. For example: On pages 3 and 4 of the brief counsel says:

> "Before appellant reported for work appellees had placed in said car a certain smoke-jack, property of the Railroad which it was shipping to Spokane, which was constructed of galvanized iron, one end of which was about 4 feet square and attached to this was a smoke stack circular in shape about 8 inches in diameter and 8 feet long, on top of which was a cross-piece of the same material and dimension; that the smoke-jack was lying lengthwise in the end of the baggage car and had a number of other packages of company material and merchandise underneath it; that circling the stack of the smoke jack were 2 flat galvanized plates which were loose upon the stack and extended out from the surface about 10 inches."

On page 6 of the brief it is stated that "the interior of the car was about 9 feet high," and on pages 7 and 8 of appellant's brief appears the following:

> "The door was open and the jack was to the right of the door on the station side near or against the wall on the floor and the sacks were in front of it. The closest end of the jack was about two feet from the doorway. At the foot of the door there were about eight or ten heavy boxes about 3 feet high and 18 inches wide, 2

feet high and a foot wide—of different sizes—that blocked the doorway. Between the doorway and the back end along side of and under and around the stack part of the jack were about ten small packages, some of which were under the stack part of the jack. Appellant arranged them in the car, first moving the heavy boxes from the front of the car door to the opposite side of the car out of the doorway. He then moved some of the packages around the smoke jack and placed them in different parts of the car where he knew they would be. Next he raised the jack. There were some packages underneath the smoke-jack which he had to get out. The smoke-jack was about 7 feet long. There was a loose disk on the stove pipe part. There was a flange probably 19 or 20 inches across on the bottom that was loose just below the disk on the pipe. (Illustrating by an exhibit in court, appellant pointed to the stack, the disk or flange of the stack and the top which is called a 'T'). He stated he never handled a smoke-jack before. He had seen them on a building or car. To his recollection none had ever been shipped before. The pipe on the part of the smoke-jack was about 8 inches across and the width extending out from the stack part was about 5 feet 6 inches. The disk he was touching was loose on the pipe and was 10 feet 12 inches from the floor."

If we accept as facts counsel's statements that the interior of the baggage car was nine feet in height; that appellant had stood up against the wall of the car the smoke-jack that was seven or eight feet long; that he was stooping over removing packages from around the base of the standing smoke-jack when it started to fall over, and his injury was received when

his hand came in contact with the sharp edge of the disk; yet, it is extremely difficult to conceive how appellant's hand could come in contact with the disk on the standing smoke-jack while the disk was "10 *feet* 12 *inches from the floor.*"

There was, of course no testimony in the record to support such statement; nor was there any evidence about the pipe or the width of anything extending out from the stack part about 5 feet 6 inches. Personally, we believe counsel intended to state *inches* instead of *feet* in both instances referred to. However that may be, it is apparent that the statements as they appear in the brief are physical impossibilities—that's all.

The above examples are amply sufficient, without further comment, to necessitate a brief statement of the facts that controlled the trial court's decision dismissing the action.

THE CONTROLLING FACTS

Appellant had been in the railroad's employment from August 4, 1909 until May 8th or 10th, 1936 or 1937. (Tr. p. 17.) He worked as brakeman for about two years, in 1910 and 1911, and as baggageman for ten or twelve years thereafter, and then as

brakeman five or six years and the remainder of the time as train baggageman. (Tr. pp. 17-18.)

On the night he received the injury, October 5, 1936, appellant reported for duty and went to work in the baggage car about thirty minutes before the leaving time of the train from Tacoma, Washington, for eastern destinations. He was employed as baggageman on that train. There was about thirty feet of the car allotted to appellant as train baggageman and there was no other representative of the appellees or other employee of the appellees in that portion of the car. The work of receiving and handling the baggage in that part of the car was wholly under the management and supervision of the appellant. (Tr. pp. 20, 21, 22).

It was dark when appellant reported for duty on October 5 at 7:30 p.m. The height of the interior of the car was about nine feet and there were about eight 25-wattage electric lights through the center of the car and four lights over the doors—twelve lights in all. (Tr. pp. 22, 23). The smoke-jack had been put into the car before the appellant arrived to go on duty. It was company material, manufactured at Tacoma in the railway shops, and it was being sent over to Spokane for use at that point. Of

its location in the car when appellant came in to begin his work, the appellant testified:

Q. "Was the jack right flush with the wall?
A. Yes.
Q. Right against the wall?
A. Yes.
Q. On the floor next to the wall?
A. It was probably not against the wall but right near the wall.
Q. And the sacks were in front of that?
A. Yes.
Q. Was the jack protruding in a manner so as to obstruct the doorway?
A. That was clear of the doorway.
MR. HANLEY: Q. How far back from the opening of the doorway was the closest end of the jack?
A. Probably about two feet." (Tr. p. 25).

After testifying with respect to some heavy boxes that blocked the doorway, appellant further testified:

"Q. Going back, was there any material between the doorway and the back end?
A. Yes.
Q. How many packages there?
A. I would say ten.
Q. From there on and alongside of the jack were there any packages?
A. Yes, small packages.
Q. Where were they?
A. Under the jack and around the jack.
Q. Under the stack part of the jack?
A. Yes.
Q. There were some under the stack part of the jack?
A. Yes.

Q. Was there any under the other end of the smoke-jack?

A. There might have been.

Q. Can you give an estimate of the number of packages or bundles located in that vicinity?

A. I would say about twelve bundles.

Q. What did you do with reference to these packages, all of them, I mean?

A. I was picking them up and looking at them, looking at the destination and placing them in the car where I could find them easily.

Q. What packages did you first touch when you first went to work on them?

A. What packages did I first touch to move them?

Q. Yes? A. I started to move some boxes.

Q. Where were those boxes located?

A. In front of the car door.

Q. Where did you move them to?

A. On the opposite side of the car.

Q. Out of the doorway? A. Yes.

Q. Then, what did you do?

A. I was moving some of the packages around the smoke-jack.

Q. Where did you place those?

A. I placed them in different parts of the car where I knew they would be.

Q. What did you do next?

A. I raised the jack.

Q. What do you mean when you say you raised the jack?

A. The jack—there was some packages underneath the smoke-jack and I raised it to get them out.

Q. Describe the smoke-jack to the jury.

A. It was about seven feet long, and there was a loose disk on the stove pipe part. There was a flange probably eighteen or twenty inches

across on the bottom that was loose just below the disk on the pipe." (Tr. pp. 26-28).

* * *

Q. Now the smoke-jack that you had in the car, was the pipe part of the smoke-jack about the same dimensions across, I would say about eight inches in diameter, about that?

A. Yes.

Q. And this disk here (indicating) that you have described, is that about the width of the disk, about five or six inches, extending out from the stack part?

A. Yes." (Tr. p. 29).

As to the movement of the smoke-jack by appellant, he testified:

"THE COURT: Just tell us what you did with it.

A. There was packages in front of it, and there was packages underneath and around it. I had to move some of those packages, and there was some packages underneath it too. In order to get at the packages I raised it up this way (indicating).

THE COURT: Did you lean it against the wall?

A. Yes.

Q. You left it there?

A. Yes.

MR. HANLEY: Q. How much time elapsed before it fell on you?

A. Probably half a minute.

Q. What were you doing at the time?

A. I was getting these packages out.

Q. Then what happened?

A. It started to move like that (indicating). I thought it was going to move—I am down on the floor getting the packages out from around it—I thought it was moving and put out my

arm to stop it and it struck me on the wrist." (Tr. pp. 32, 33).

* * *

"Q. How did you find out where it was going?
A. I looked at the tag.
Q. Where was the tag?
A. Tied on the 'T' end.
Q. How did you see it was on it?
A. When I raised it up from the floor I saw it and I looked at the tag. I saw the tag up there on the 'T' end so I noticed it was going to Spokane." (Tr. p. 34).

"Q. When the smoke-jack struck your left wrist, I think you testified, did it fall clear over?
A. No.
Q. What happened to it?
A. I just kind of straightened it up." (Tr. p. 38).

With respect to the appellant's ability to see in view of the light in the car, the record is:

"THE COURT: You saw the packages, you saw what you were moving. You saw the packages and the smoke-jack, you stood it up; you were not in the dark at any time, were you? A. No, sir.
Q. You did not have to grope for anything, did you?
A. No, sir.
Q. You knew what the object was?
A. Yes, sir.
Q. You had light enough for that?
A. Yes, sir. (Tr. p. 40).

* * *

"THE COURT: Q. When you stood it up you saw its contour and you saw the parts that made it up?
A. Yes sir.

Q. You stood it up because you wanted it out of the way?

A. Yes, sir.

Q. That occurred long after you had looked at the tag?

A. The accident?

Q. When you stood it up?

A. Yes, sir.

Q. Then you went about your work?

A. Yes, sir.

Q. You testified you raised it up; you stood it up, did you?

A. Yes, sir.

Q. Then you stooped down to do some other work?

A. Yes.

Q. And in about half a minute it fell?

A. Yes.

Q. Getting back to the accident, then after about half a minute it fell towards you and you put out your left arm to put it to rest, to stop it, and it cut you?

A. Yes.

Q. All of this time this happened you were stooping?

A. Yes.

Q. You could see what the object was in front of you?

A. Yes." (Tr. p. 41).

The foregoing excerpts from the record show all of the facts material to the disposition of this case on this appeal; to which may be added, as explanatory, that the train conductor called as a witness by appellant, testified that the disk or sleeve around the pipe of the smoke-jack referred to was not sharp-

ened like a knife, but that it was just the raw edge of the metal. (Tr. pp. 72, 73.)

Upon the foregoing facts established by the plaintiff's evidence the trial court sustained the defendants' motion for involuntary dismissal. (Tr. p. 99.) No motion for new trial was made or presented and on August 8, 1939, the court signed its judgment dismissing the action.

In sustaining the motion to dismiss the trial court analyzed the controlling facts and applied the law with a convincing force that completely answers the argument made by the appellant on this appeal. So pertinent is the decision to the applicable facts of the case that we quote it in full from the record.

"COURT'S DECISION

> THE COURT: Gentlemen, I have allowed extensive arguments because I felt that, irrespective of the conclusion that I reach in this matter, a discussion of the problems of law involved would help clarify to the Court the position of the parties, so that even though the motion be denied, the Court would have the benefit of that as a guide in instructing the jury. I think the disagreement between counsel can be outlined in this manner, the difficulty results not so much from what the law is, but from the application of the law to the particular facts. As I had occasion to say yesterday, that the principle of proximate cause is well known and the principle

is recognized as ultimately the question of what the proximate cause was for the jury to determine. Contributory negligence is out of the case because of the Employer's Liability Act, I think it is Section 53 of Title 45 * * * (Citing cases.) The facts clearly show, whether you approach them from the standpoint of proximate cause, that the proximate cause of the injury was not anything that the defendant did. The defendant placed this object in the car but it was there in full view. While it is true it was possibly dim, it is evident that there was ten twenty-five watt lights in the center of the car and for a man working near the door at 7:30 o'clock in the afternoon, they provided light enough to see the objects there, he could distinguish them there. He saw the jack, and said it was made of corrugated iron. He saw under it and above it and around it where there was other objects that he had to handle in performing his duty. He was there for the purpose of arranging the car and started out arranging the car to suit himself. Had this jack been set up by the company and had he, while removing one of the sacks, caused it to fall and came into contact with it, it might have presented the question to the jury as to whether placing it in that position where it might fall didn't present a question of fact. Now, repeatedly we have cases of negligence involving falling objects and in these cases it is held that where the object was placed by the employer in a position where it might fall and it did actually fall and someone has an injury, invitee or employee, the question then is one for the jury. But, in this particular case, the object was placed by the employer in a position where it didn't cause the injury, where it could not cause the injury unless he stumbled against it, assuming that it had a raw edge. In arranging

his objects to suit himself, it is true it was his duty to pick up the objects, but he was under no compulsion to arrange them in any particular manner. The baggage had not come yet; there was no one in front asking for the baggage truck and no one hurrying him about his work. He had reported for duty and went in there to arrange his place for work. He saw these objects and proceeded with the arrangement of them in a manner to suit himself. Had something happened, had the steel strapping on the end of those boxes caused the sharp edge to come into contact with his hand, then the question of negligence would become factual, but I don't remember anything of that sort happening in this case. He picked up the package and held it over to the light to read the small label attached to it and saw it was destined for Spokane. Immediately he proceeded to put it back and arrange it in a manner he thought was a proper manner and arranged it against the wall in a standing position and then stooped and proceeded to work on the packages near and about it and it fell. Now, we don't know why it fell; many causes might have intervened; it might have been that he pulled something from in back of it or placed something right under the stack or that it may have been he placed it insecurely against the wall; in other words, we have any one of three or four causes that might have caused it. And there is no cause that is traceable to the employer but, even if we assume that the presence of this sharp instrument may have been the cause, we have several other causes and, under the authorities of these two cases, a jury would have to speculate as to which cause was the proximate cause of the injury, but I will go further and say, if the sole cause of the injury was, as alleged in the complaint, the coming in contact of the plaintiff's wrist with this smoke-jack and that

occurred after the plaintiff had placed it in a position, and the only position, in which it could fall and hurt him, that that was the proximate cause of the injury. I would go further and say, if it were the case of an axe, if we assume he had an axe with a sharp edge, placed there unprotected, that if in placing it out of the way he had suspended it on a nail and it had fallen off and damaged him, there could be no recovery. Yesterday I referred to a situation where we assumed that in placing several objects or packages he had placed them on top of each other and the top one had fallen off and the top one was found to contain heavy matter or some liquid that might be injurious to the human body, there could be no claim when the act of the employee, in arranging the material, caused that to come into contact with his body. There is no act traceable to the employer when the employer placed upon the premises an object which might have caused the injury under other circumstances; that is, if it had been allowed to remain as it was, but, in fact it was not, the cause being the act of the employee in arranging the material.

I do not think that the presence of an object of this character, large and visible, which merely has a raw edge resulting from the ordinary cutting of corrugated iron, can be called a dangerous object so as to bring the case within the Squib case. For one thing the situation is so entirely different that it would require stretching our imaginations between this situation and the situation where one puts into motion a series of events which is responsible for the injury. There must be a violation of duty and the doing of a thing which results in the injury. Here the placing of the jack in the car could not by any stretch of the imagination have been the proxi-

mate cause of the injury. It was his act in putting it up in a position where it would fall on him. It might be conceived that if a dangerous object were placed in a place of work and the employee, in order to protect himself, moved it to a place adjacent which proved to be just as hazardous as the one originally existing, we might claim a continuity of events, but here there is no continuity whatsoever. The entire continuity was broken. If he had set it up in a safe way he could not have been hurt. Here it was the quick force of his arm against the falling object that caused the injury, and we do not know which of the many causes caused it to fall and not one of them is traceable to the original placing of the object by the defendant.

It is always disagreeable for Courts to have to determine that a person who evidently was injured is without remedy but we cannot create liability where the law says it does not exist and the law having said that the liability of even an employer is based on fault only, and where it affirmatively appears that it is not at fault, the fault being solely that of the employee, it becomes the duty of the Court to disregard the sympathy it might have for a person, and determine the matter strictly according to the dictates of the law, because ultimately the meaning of the rule of law which is the fundamental of our judicial system, is that it is binding upon the Courts as well. Courts cannot disregard the principles of law which are established by the Congress or the Legislative Body and interpreted by the Court and which limit liability to the circumstances of certain facts only.

The defendant's motion to dismiss will be granted and the case will be dismissed." (Tr. pp. 94-99.)

ARGUMENT

On pages 16-17 of his brief appellant's counsel insists that the trial Court should have submitted the cause to the jury as a question of fact "for the reason (A) that there was evidence of actional negligence of appellees that was the proximate cause of appellant's injury; (B) that appellant did not assume the risk of his injury as a matter of law."

Point (A) of the appellant's argument is subdivided into three parts. Part 1 asserts that there was sufficient evidence of appellees' negligence to present an issue of fact for determination by the jury. Part 2 relates to proximate cause, and part 3 discusses the effect of an intervening cause. These will be briefly discussed in the order in which they are presented in appellant's brief.

(A) 1.

In support of the contention that there was evidence of negligence on the part of appellees, on page 17 of his brief counsel says:

> "The grounds of negligence relied upon by appellant were: (a) appellees failed and neglected to wrap and protect the sharp edges of galvanized circular plates extending from stack of smoke-jack by covering them with burlap or other material; (b) appellees failed to warn appellant of the dangerous and sharp edges of

the galvanized plates prior to the time he was required to handle same."

With respect to subdivision (a), there was no evidence whatever of any rule, regulation or custom that required material of that kind to be wrapped with burlap or crated; nor was there any testimony of any witness that had handled or seen such material handled or transported, who gave any evidence whatever as to the manner in which property of that character should be prepared for transportation.

The appellant testified that he had never seen a smoke-jack before except on the top of cars or buildings, and of course his opinion as to how it should be prepared for shipment added nothing in support of that ground of negligence.

This smoke-jack was made in the railway company shops at Tacoma and it had been placed in the baggage car as company material to be delivered at Spokane. It was not a shipment of an article as a common carrier service by the railway company, but was the movement of its own manufactured article for use in another part of its operations.

Moreover, the smokejack had been placed on the floor against the sidewall of the car with a tag on the end which advised appellant that it should be put off at Spokane. There was no occasion whatever for

appellant to move the smoke-jack until the train arrived at Spokane. It was not in the way of the appellant's operations at the time he set it up and examined it and then stood it up against the sidewall of the baggage car. If there were any bundles or packages underneath it which he needed to remove, common sense demonstrates that he could easily have pulled the bundles out from beneath the smoke-jack. The physical facts overcome any statement of the appellant that it was necessary to set this article up against the wall to take out any packages he desired to move from beneath the smoke-jack. The argument on that point is wholly without merit and no ground whatever for an issue of fact as to any negligence of appellees in that respect.

Subdivision (b) is likewise without support in the testimony. If the appellant could see the writing on the tag that indicated the smoke-jack was to go to Spokane, then he could see that the smoke-jack was not crated and not wrapped as counsel says it should have been wrapped. Under such circumstances there was no reason to advise appellant of that which he could see if he had looked.

Plainly there is no merit to the contention that there was sufficient evidence of appellees' negligence to require a submission of that question to the jury.

The record is silent of any negligence that caused or contributed to the injury received by the appellant. The conclusion is too plain for further discussion. The thing speaks for itself.

(A) 2, (A) 3.

These two questions may be discussed in a single argument. They relate to proximate cause and the occurrence of the intervening cause. The authorities cited and discussed on pages 19 to 33 of appellant's brief necessarily cover both subjects and they will be considered together. Before analyzing appellant's authorities it is essential, however, to relate the fundamental principles that control the disposition of this case.

It is conceded that appellant's service at the time he received the alleged injury falls within the federal Employers' Liability Act as it existed when the accident occurred. The decisions of the Supreme Court have interpreted that Act and those decisions defining the rights and the liabilities of the parties are controlling on the disposition of this case. Under the rule of law there applied two essentials must be established before a recovery can be had. First, negligence of the employer must appear from the facts of the case; second, the negligence established must be the proximate cause of the injury received. If

either essential is not established the action must fail.

Northwestern Pacific R. Co. v. *Bobo,* 290 U. S. 499;

Atchison T. & S. F. Ry. Co. v. Toops, 281 U. S. 351, 354, 355;

Chicago, M. & St. P. R. Co. v. *Coogan,* 271 U. S. 472;

Atchison T. & S. F. Ry. Co. v. *Saxon,* 284 U. S. 458;

In the present case both essentials are missing. We have pointed out that the evidence fails to show any negligence of appellees; and clearly, that negligence, if established as contended by appellant, was not the proximate cause of appellant's injury. Since the trial court preferred to dispose of the case on the last essential requirement, without deciding the first, the answer to plaintiff's argument will follow the course pursued by the court below.

On page 26 of appellant's brief counsel furnishes his sole argument as to (A) 2 in this language:

> "Proximate cause of an injury is ordinarily a question of fact for the jury to be determined in view of the circumstances of fact attending it. It is not a question of science or legal knowledge."

Following that quotation counsel cites and discusses seven court decisions which we will presently show have no application whatever to the point involved in the disposition of this case, and concludes

with a textbook quotation from *Roberts Federal Liability of Carriers,* Vol. 2, Sec. 876.

We are inclined to agree with counsel that the proximate cause of an injury is not a question of *science* or *legal knowledge.* We would much prefer to have counsel give a definition of the term which he considered applicable to the facts of the present case. Perhaps the difficulty of formulating one that would support his theory of the case accounts for the omission. However that may be it is evident that *common sense* furnishes the only practical definition of the term. The proximate cause of an accident is that cause which if it had not existed the accident would not have occurred.

In this case the act of the plaintiff in standing the smoke-jack up against the wall of the baggage car was the proximate cause—the cause which if it had not existed the accident would not have occurred. As was aptly said by the trial court (Tr. p. 97): "but I will go further and say, if the sole cause of the injury was, as alleged in the complaint, the coming in contact of the plaintiff's wrist with the smoke-jack and that occurred after the plaintiff had placed it in a position, and the only position, in which it could fall and hurt him, that that was the proximate cause of the injury."

In the cases cited in appellant's brief under this subject, the place or condition created by the defendant had not been changed or altered by the plaintiff or by any other person. The question in each case was whether the negligent act of the defendant was the proximate cause of the injuries sustained by the plaintiff. None of them have any application whatever to the facts of the present case for the reason given by the trial court in the opinion above quoted.

In the first case cited and quoted from, *C. M. & St. P. Ry. Co.* v. *Kellogg,* 94 U. S. 469, the definition of the term "proximate cause" is given in the following language:

> "The question always is: Was there any unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?"

Reference to the opinion shows that counsel's quotation erroneously uses the word "force" for the word "facts" as it appears in the opinion.

We have no fault to find with the definition given by the learned Court. The case has no application to the present case, for here there was a "new and independent cause intervening between the wrong and injury."

In *Davis* v. *Wolf,* 263 U. S. 239, the second case cited under this subject in appellant's brief, the employee fell from a car due to the defective condition of a grab-iron.

In *Baltimore & O. R. Co.* v. *Tittle,* 4 Fed. (2d) 818, the injury to the employee was sustained when the knuckle of a coupler fell on him after he had pulled out the knuckle pin to loosen the knuckle. The injury was due to the defective condition of the knuckle.

In *Hines v. Smith,* 275 Fed. 766, the fireman was killed when struck by a locomotive, and the defective automatic bell ringer operated by the defendant was the alleged proximate cause of the fireman's death.

In *Erie R. R. Co.* v. *Schleenbaker,* 257 Fed. 667, the conductor was injured when he missed the grab-iron on the caboose due to the condition of the lights on the caboose.

In *Erie R. R. Co.* v. *White,* 187 Fed. 556, the employee was killed while walking between cars in a moving train due to the defective blocking of a guard rail.

In *Donegan* v. *Baltimore & O. R. Co.,* 165 Fed. 869, the plaintiff, a brakeman on a freight train, was injured due to a broken automatic coupler on one of the cars while he was attempting to make a car coupling.

The mere statement of the manner in which these injuries occurred in the cases cited demonstrates that they can have no application to the facts of the present case. In every one of them the condition upon which the charge of negligence is based was the act or responsibility of the employer, and in none of them was there any change or alteration whatsoever in that condition by the injured party or by any other employee or agent of the employer.

The citation from *Roberts Fed. Liability of Carriers,* Vol. 2, Sec. 876, appearing on page 29 of appellant's brief, is supported by cases cited in the footnote that are of the same type as the cases cited by appellant's counsel above discussed. It is pertinent to suggest that the section following the one quoted from provides:

> "On the other hand, if such causal relation does not appear, in any legitimate view of the evidence, and finding of the existence must rest wholly upon specultaion or conjecture, the question may be withdrawn from a jury, or if submitted the verdict set aside."

On page 29 of appellant's brief the case of *Crane* v. *Oliver Chilled Plow Works,* 280 Fed. 954, a decision of this Court is cited and discussed. In that case this Court on page 957 in the opinion, quotes and approves the language of Mr. Justice Strong of the Supreme Court in the *Kellogg* case (94 U. S. 469)

above quoted, and the definition of proximate cause as given in that opinion was approved by this Court.

Without encumbering this brief with a further discussion of this subject, we refer to the decisions of the Supreme Court hereinbefore referred to as sustaining the rule applicable to the established facts of this case. Those cases hold that in order to sustain a claim under the federal Employers' Liability Act the plaintiff must in some adequate way establish negligence of the carrier and casual connection between the negligence and the injury.

A. T. & S. F. Ry. v. *Saxon,* 284 U. S. 458;
N. Y. C. Ry. v. *Ambrose,* 280 U. S. 486;
A. T. & S. F. Ry. v. *Toops,* 281 U. S. 351-354;
Davis v. *Kennedy,* 266 U. S. 147;
Railway Co. v. *Bobo,* 290 U. S. 499;
C. M. & St. P. Ry. v. *Coogan,* 271 U. S. 472;
Toledo Ry. Co. v. *Allen,* 276 U. S. 165;
Seaboard Air Line v. *Horton,* 233 U. S. 492.

Under the rule established by the Supreme Court in interpreting the Employers' Liability Act it is clear that the judgment of the trial court in disposing of this case on the ground now under discussion was correct and should be sustained.

(B.)

This point involves the argument of counsel on pages 33-41 of his brief, and cases are cited defining the application of the doctrine generally under the federal Employers' Liability Act. We need not enter into a discussion of the cases cited for the reason that the trial court's decision in dismissing the action rests primarily upon the ground that the alleged negligence of the appellees was not the proximate cause of the injury sustained by the appellant. We desire, however, to call the court's attention to the facts of this case which clearly show that the appellant assumed the risk incident to his employment of being injured by the smoke-jack falling over toward him after he had placed it upon the bundles against the wall, and while he was moving or undertaking to move some of the bundles from around and beneath the foot of the smoke-jack.

The appellant testified that he raised this jack up and read the tag which showed its destination. He also testified that the disk that encircled the smoke-jack injured his hand at the time he came in contact with the disk in undertaking to prevent the smoke-jack from falling over.

We submit that he had full opportunity to note the condition of the smoke-jack and the disks thereon

while examining it and placing it up against the wall. The disk he encountered must have been fairly well up from the bottom on the pipe of the smoke-jack or he would not have come in contact with it in trying to prevent the smoke-jack from falling over.

However that may be, the testimony is that he had charge of the arrangement of all articles in the baggage car; that he took this smoke-jack up from where it had been placed by the appellees, set it upon some packages and leaned it against the wall, and that while removing some of the packages it started to fall over and the injury was sustained while attempting to prevent the smoke-jack from falling over.

Under such circumstances he is responsible for the position in which the smoke-jack was placed. The condition which caused his injury was one created by himself. Manifestly he could not have received the injury if he had not arranged this article in the car to suit his own convenience. Under such circumstances the established rule of law is that he assumes the risk of any danger incident to the arrangement he saw fit to make of the articles in the car under his direction and control.

In *A. T. & S. F. Ry.* v. *Wyer*, 8 Fed. (2d) 30, C. C. A. 8th Circuit, announced this well-considered rule:

"And where the risks are variable, owing to

changing conditions either in the character of the work or in the way it is performed, the employee assumes the risk of such changing conditions; and especially is this true where the changed conditions have been brought about by himself or a fellow servant."

In *Darden* v. *Nashville C. & St. L. Ry. Co.,* 71 Fed. (2d) 799, at page 801, the Circuit Court of Appeals, 6th Circuit, said:

"When a servant is charged by the terms of his employment with a duty of keeping his working place safe or of making a dangerous working place secure, there is no basis for liability against the master, for the rule requiring him to furnish a reasonably safe place is not operative. The master may not be justly charged with failure to perform a duty which the servant has expressly or impliedly assumed. The risk arising from such a situation must be classified among those ordinarly incident to the employment."

In *Saunders* v. *Longview, Portland & N. R. Co.,* 161 Wash. at page 284, the Court says:

"It must be borne in mind that appellant is a blacksmith of thirty years' experience, and on the morning of the accident he himself adopted the method by which he chose to do the work and voluntarily selected his working place without direction from a general foreman. In *Newman* v. *Rothchild & Co.,* 135 Wash. 509, 238 Pac. 2, we said: 'The charge of negligence that the appellant was required to stand upon the timber which had been put in cross sticks has no merit. He had arranged it. If it was dangerous he knew it bet-

> ter than anyone else could. He had make his own place of work. If it was not a safe place, nobody was to blame but himself.' "

Many additional cases along the same line of reasoning could be cited and discussed. The situation here involved is one that speaks for itself. It needs no authority to support the trial Judge's decision in sustaining the motion to dismiss made at the end of the plaintiff's case. Judgment appealed from should be affirmed.

STRIKING AND REFUSING TO ADMIT TESTIMONY

On pages 41-43 counsel under this subject urges that specification of error set out in his brief at page 15 requires this Court to consider the ruling of the trial Court on admissibility of certain testimony offered by the plaintiff. That subject is a matter that involves an alleged error of law occurring at the trial which, under the Rules of Practice, requires a motion for new trial. (Rule 59, Rules of Civil Procedure.) As no motion for new trial was made or presented to the trial Judge, the matter is not here for review on this appeal.

In any event, for the reasons above discussed, the judgment of the trial Court is correct and should be affirmed.

Respectfully submitted,

J. N. DAVIS,
THOS. H. MAGUIRE,
A. J. LAUGHON,
608 White Bldg., Seattle, Wn.

ROBERT B. ABEL,
Perkins Bldg., Tacoma, Wn.
Attorneys for Appellees.

No. 9393

United States

Circuit Court of Appeals

For the Ninth Circuit.

CO-OPERATIVE OIL ASSOCIATION, INC., an association,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the United States Board of Tax Appeals.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 9393

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

For Taxpayer:
J. L. EBERLE, Esq.,
WALTER GRIFFITHS, Esq.

For Comm'r.:
H. R. HORROW, Esq.

Docket No. 94580

CO-OPERATIVE OIL ASSOCIATION, INC., an association,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1938

Jul. 2—Petition received and filed. Taxpayer notified. (Fee paid)

" 2—Copy of petition served on General Counsel.

" 2—Motion for circuit hearing at Boise, Idaho; Portland, Oregon or Salt Lake City, Utah, filed by taxpayer. 7/2/38 copy served.

1938

Aug. 9—Answer filed by General Counsel.

" 11—Copy of answer served on taxpayer. Salt Lake City, Utah.

Sep. 1—Hearing set beginning Nov. 7, 1938 at Salt Lake City, Utah.

" 12—Notice of appearance of J. L. Eberle as counsel for taxpayer filed.

" 26—Notice of appearance of Walter Griffiths as counsel for taxpayer filed.

Nov. 7—Hearing had before Mr. Van Fossan on merits. Submitted. (Idaho cooperative marketing act filed) Petitioner's Brief due 12/7/38. Respondent's due 1/7/39—reply 1/22/39.

" 23—Transcript of hearing of Nov. 7, 1938 filed.

Dec. 6—Brief filed by taxpayer. 12/6/38 copy served.

1939

Jan. 5—Brief filed by General Counsel.

" 23—Reply brief filed by taxpayer. 1/24/39 copy served.

Jul. 7—Memorandum findings of fact and opinion rendered, Mr. Van Fossan, Div. 9. Decision will be entered for respondent.

" 10—Decision entered, Mr. Van Fossan, Div. 9.

Oct. 5—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.

" 9—Proof of service filed with affidavit of mailing attached.

1939

Nov. 14—Order from the 9th Circuit enlarging the time to December 20, 1939 to transmit and deliver record filed.

" 24—Statement of evidence lodged.

" 24—Agreed praecipe filed with proof of service thereon.

" 27—Stipulation re approval of statement of evidence filed.

" 28—Statement of evidence approved and ordered filed. [1*]

United States Board of Tax Appeals

Docket No. 94580

CO-OPERATIVE OIL ASSOCIATION, INC., an association,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named Petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice

*Page numbering appearing at foot of page of original certified Transcript of Record.

of Deficiency (IT:E:4 HAK—90D) dated April 5, 1938, and as a basis of its proceedings alleges as follows:

1. That the Petitioner, Co-operative Oil Association, Inc., at all times herein mentioned was and now is a nonprofit cooperative marketing association, organized and existing under and by virtue of the Cooperative Marketing Act of the State of Idaho, with its principal office and place of business at Caldwell, in the County of Canyon, State of Idaho, and the returns for the periods involved herein were filed with the Collector of Internal Revenue at Boise, Idaho, as follows: Return for the period December [2] 31, 1933 to October 31, 1934, filed on the 14th day of March, 1935; for the period October 31, 1934 to October 31, 1935, filed on the 14th day of January, 1936.

2. The Notice of Deficiency above mentioned, a copy of which is attached hereto, marked "Exhibit A" and made a part hereof as if fully set forth at length herein, was mailed to the Petitioner on the 5th day of April, 1938.

3. The taxes in controversy are Income and Excess Profits Taxes for the taxable year January 1, 1934, to October 31, 1934, and the taxable year ended October 31, 1935, as follows:

> Deficiency tax liability for taxable year January 1, 1934, to October 31, 1934, $1,065.25 and deficiency Excess Profits tax liability for same period, $487.36, making a total of $1,452.61.

Tax liability for taxable year October 31, 1934, to October 31, 1935, $1,696.33, and deficiency Excess Profits tax liability for same period, $618.39, making a total of $2,314.72.

Accordingly the amount of said deficiency Income Tax liability is $2,761.58, and said Excess profits tax liability is $1,005.75.

4. The determination of tax, set forth in said Notice of Deficiency is based upon the following errors: [3]

(a) That the Commissioner erred in disallowing the deduction made by Petitioner for the taxable year January 1, 1934, to October 31, 1934, for patronage dividends in the sum of $6,872.68.

(b) That the Commissioner erred in disallowing the deduction made by Petitioner for the taxable year October 31, 1934, to October 31, 1935, for patronage dividends in the sum of $11,147.30.

(c) That the Commissioner erred in finding and holding that there was nothing in Petitioner's Articles of Incorporation, By-laws, marketing agreement and in the Cooperative Marketing Act of the State of Idaho which would cause the patronage dividends disallowed by said Commissioner to accrue as such, without corporate action setting them apart as a liability of Petitioner to its members.

(d) That the Commissioner erred in holding that deductions for patronage dividends by this Petitioner should be limited to amounts which were declared or paid during the taxable year.

(e) That the Commissioner erred in not holding, finding and determining that under, pursuant to, and by virtue of the Cooperative Marketing Act of the State of Idaho and the Articles of Incorporation and the By-Laws of Petitioner, and the Membership Agreement between Petitioner and its members, the items disallowed [4] by said Commissioner, as hereinbefore mentioned, for patronage dividends in the sum of $6,872.68 for the taxable year ended October 31, 1934, and in the sum of $11,147.30 for the taxable year ended October 31, 1935, accrued as obligations from said Petitioner to its members, without further corporate action.

(f) That the Commissioner erred in failing and refusing to recognize the liability of Petitioner to its members for the amounts evidenced by the items disallowed by him, as hereinbefore mentioned, which liability was fixed by the Cooperative Marketing Act of the State of Idaho, the Articles of Incorporation, By-Laws and Marketing Agreement of Petitioner, and could not be changed or altered by any corporate act of its directors or officers.

(g) That the Commissioner erred in not finding, holding and determining that the funds

evidenced by the items disallowed by him, as hereinbefore mentioned, were savings of Petitioner's members, belonged to such members, were not the property of this Petitioner, and that a definite liability existed on the part of this Petitioner to its members for the payment and distribution of such funds, which could not be changed, altered or amended in any way by the Board of Directors or officers of the association.

5. The facts upon which the Petitioner relies, as the basis of this proceeding are as follows: [5]

(a) That Petitioner, during the periods involved in this proceeding, namely, January 1, 1934, to October 31, 1935, and at all times since its organization, was, and now, is, an association of producers of agricultural products incorporated, organized and existing under and by virtue of the Cooperative Marketing Act of the State of Idaho, being Chapter 20, Title 22 of the Idaho Code Annotated, as amended by 1935 Session Laws, Chapter 113, for the purpose of supplying its members with necessary agricultural supplies on a cooperative basis, without profit; that at all times since its organization Petitioner has operated on a strictly cooperative basis, without profit to the Petitioner or to its members as such, for the purpose of supplying its members supplies, as hereinbefore mentioned, and to promote, foster and encour-

age the intelligent and orderly procuring of agricultural supplies and to eliminate speculation and waste and to make the procuring of agricultural supplies as direct as can be efficiently done through cooperation; that in such operation your Petitioner carried out the policy announced in said Cooperative Marketing Act of the State of Idaho and complied with its terms and provisions, said Act specifically providing that every association organized thereunder shall be nonprofit, as every such association is not organized thereunder to make profits for itself as such, or for its members [6] as such, but only for its members as producers.

(b) That pursuant to and in accordance with the provisions of said Cooperative Marketing Act, and particularly that provision providing that your Petitioner was not organized for profit to itself or its members as such, this Petitioner at all times hereinbefore mentioned did, and now does, keep its books and records with an accurate statement of the exact amount of supplies purchased by each and every member, each member having a separate account, so that your Petitioner can at all times ascertain the exact amount of all sums, advanced by any member, to which such member is entitled; that the items disallowed by the Commissioner, as hereinbefore mentioned, evidenced sums advanced by members for the purchase of supplies

and not used by the association in the payment of such supplies or its operating expenses, and belonged to and were the property of Petitioner's members in a definite proportion, according to patronage as fixed by its Articles of Incorporation, By-laws, and Membership Agreement, and were not earnings or the property of your Petitioner; that the portion of the sums or funds evidenced by the items so disallowed by the Commissioner, to which each of Petitioner's members was entitled, and the amount of the liability of Petitioner to each member, of such funds, at all times were and now are ascertainable and shown by the books and records of your petitioner. **[7]**

(c) That the Cooperative Marketing Act of the State of Idaho, above mentioned, and the Articles of Incorporation, By-laws, and Membership Agreement of Petitioner, provide in substance and effect that sums advanced by Petitioner's members for the purchase of supplies and not used in the purchase thereof or in the operating expenses of Petitioner, are savings to and the property of Petitioner's members, as above mentioned, and become and are obligations and liabilities of Petitioner to such members, in proportions according to patronage, as above mentioned and as shown by the books and records of Petitioner, and that the amount of such sums is a definite liability of Petitioner

that the determination of your excess-profits tax liability for the years mentioned discloses a deficiency of $1,005.75, as shown in the statement attached.

In accordance with Section 272(a) of the Revenue Act of 1934, notice is hereby given of the deficiencies mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiencies above stated.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:Cl:P-7. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,
GUY T. HELVERING,
Commissioner.
By JOHN R. KIRK
Deputy Commissioner.

Enclosures:
Statement
Form 870 [10]

STATEMENT

IT:E:4
HAK-90D

Co-operative Oil Association, Inc.,
Formerly Co-operative Union Oil Company,
210 South Seventh Street,
Caldwell, Idaho

Tax Liability for Taxable Year January 1 to October 31, 1934 and Taxable Year Ended October 31, 1935.

Income Tax Liability

Year	Liability	Assessed	Deficiency
January 1 to October 31, 1934	$1,475.08	$ 409.83	$1,065.25
Year ended October 31, 1935	2,343.27	646.94	1,696.33
Totals	$3,818.35	$1,056.77	$2,761.58

Excess-Profits Tax Liability

January 1 to October 31, 1934	$ 505.57	$ 118.21	$ 387.36
Year ended October 31, 1935	722.62	104.23	618.39
Totals	$1,228.19	$ 222.44	$1,005.75

In making this determination of your income and excess-profits tax liabilities, careful consideration has been given to the internal revenue agent's reports dated October 15, 1937, and to your protest dated November 29, 1937.

Adjustments to Net Income

Taxable Year January 1
1934 to October 31, 1934

Net income as disclosed by return		$ 2,511.67
Unallowable deductions and additional income:		[11]
(a) Profit on stock	$ 2.65	
(b) Option written down	20.00	
(c) Reserve for interest, taxes, etc.	1,338.38	
(d) Depreciation	282.30	
(e) Patronage dividends	6,872.68	8,516.01
		$11,027.68
Nontaxable income and additional deductions:		
(f) Book profit overstated	$ 0.54	
(g) Income tax overstated	.10	
(h) Nontaxable interest	32.00	
(i) Cash "short"	267.18	299.82
Net income corrected		$10,727.86

Explanation of Adjustments

Items (a), (b), (c), (d), (f), (g), (h) and (i), inclusive. These adjustments which were made in a previous examination of your books of account and records under date of July 30, 1936, were agreed to by you as evidenced by payment of the amount of the deficiency resulting therefrom to the collector of internal revenue for your district.

Item (e). Patronage dividends were declared by the board of directors and paid as follows:

Date Declared	Date Paid	Amount Declared and Paid
March 13, 1934	April 30, 1934	$3,200.85
September 12, 1934	October 31, 1934	4,663.68
Total paid		$7,864.53
Amount deducted in the return		14,737.21
Amount disallowed		$6,872.68

[12]

Since liability for payment of patronage dividends pursuant to corporate action during the year January 1, 1934 to October 31, 1934, amounted to $7,864.53, which amount is less than the amount available for payment of said dividends, this amount has been allowed as a deduction from gross income. See Farmers Union State Exchange, 30 United States Board of Tax Appeals 1051 and Fruit Growers' Supply Co. v. Commissioner, 56 F. (2d) 90, 10 Am. Fed. Tax Rep. 1277.

Computation of Tax

Income Tax

Net income		$10,727.86
Income tax liability at 13¾%		1,475.08
Income tax assessed:		
Original, account #March 1935, 40013	$345.35	
Additional, October 1936 list, account #52001	64.48	409.83
Deficiency of income tax		$ 1,065.25

Excess-Profits Tax

Computation in accordance with Income Tax Ruling 2951, Internal Revenue Bulletin dated January 20, 1936, volume 15, No. 3, page 2.

1. Net income for ten-month period		$ 10,727.86
2. Item (1) multiplied by 12		128,734.32
3. Net income on annual basis ($128,734.32 ÷ 10)		12,873.43
4. Deduction of declared value (12½% of $5,918.00)		739.75
5. Net income subject to excess-profits tax		$ 12,133.68
6. Tax on item (5) at 5%—annual basis		$ 606.68
7. Excess-profits tax liability for period ($606.68 x 5/6)		$ 505.57

[13]

8. Excess-profits tax previously assessed:		
Original, account #March 1935, 40013	$88.60	
Additional, October 1936 list, account #52001	29.61	118.21
Deficiency of excess-profits tax		$ 387.36

Adjustments to Net Income

Year Ended October 31, 1935

Net income as disclosed by return		$ 4,705.06
Unallowable deductions and additional income:		
(a) Adjustment preferred stock account	$ 65.00	
(b) Taxes	224.89	
(c) Dividends paid	556.23	
(d) Depreciation	172.89	
(e) Donations	36.50	
(f) Organization expense	399.67	
(g) Patronage dividends	11,147.30	12,602.48
		$17,307.54

Nontaxable income and additional deductions:		
(h) Nontaxable interest	$ 240.00	
(i) Cash "short"	25.58	265.58
Net income corrected		$17,041.96

Explanation of Adjustments

(a) In connection with the reconciliation of accounts receivable from subscribers to preferred stock with preferred stock subscribed but unissued an uncollectible account was charged to the reserve for bad debts. A corresponding credit of $65.00 to preferred stock subscribed but unissued was transferred to surplus and reported as nontaxable income in the income tax return. The credit to preferred [14] stock subscribed but unissued should have been offset against the charge to accounts receivable and inasmuch as a deduction was claimed for an addition to the reserve for bad debts, a credit of $65.00 constitutes taxable income.

(b) Property taxes were accrued in the estimated amount of $1,365.00 as compared with an actual liability of $1,180.11 which existed at October 31, 1935, making a difference of $184.89. The deduction claimed in the income tax return was found overstated by the amount of $40.00 and taxes deduction has been reduced from $1,850.49 to $1,625.60.

(c) A deduction of $556.23, representing dividends paid on preferred stock, was erroneously claimed in the income tax return.

(d) An adjustment of overaccrual of depreciation amounting to $172.89 was credited to surplus

account and was reported as non-taxable income in schedule L of the income tax return. This amount should have been offset against the deduction claimed for depreciation.

(e) Donations made in the amount of $36.50 are not deductible from gross income. See article 23 (o)-2, Regulations 86, Revenue Act of 1934. A deduction in the amount of $36.50 was erroneously claimed under item 25(b), page 1, of the income tax return.

(f) Organization expense written off in the amount of $399.67 has been disallowed as a deduction from gross income in accordance with article 24-2, Regulations 86, Revenue Act of 1934. This item was included in the deduction claimed for legal expenses amounting to $618.67 under item 25(b), page 1, of the income tax return.

(g) Patronage dividends were declared by the board of directors and paid as follows:

Date Declared	Date Paid	Amount Declared and Paid
February 13, 1935	April 18, 1935	$ 6,569.38
October 9, 1935	October 31, 1935	11,357.15
Total paid		$17,926.53
Amount deducted in the return		29,073.83
Amount disallowed		$11,147.30

[15]

Since liability for payment of patronage dividends pursuant to corporate action during the taxable year ended October 31, 1935 amounted to $17,-

926.53, which amount is less than the amount available for payment of said dividends, this amount has been allowed as a deduction from gross income. See Farmers Union State Exchange, 30 United States Board of Tax Appeals 1051 and Fruit Growers' Supply Co. v. Commissioner, 56 F. (2d) 90, 10 Am. Fed. Tax. Rep. 1277.

(h) Interest accrued on bonds of the Pioneer Irrigation District, a political subdivision of the State of Idaho, amounting to $240.00, was included in interest income reported in the amount of $260.42. The amount of $240.00 has been excluded from gross income under the provisions of section 22(b) (4), Revenue Act of 1934.

(i) An additional deduction has been allowed for cash short, the computation of which is as follows:

Cash short for the fiscal year ended October 31, 1935, appearing in ending balance sheet submitted with the income tax return for that year	$ 236.66
Less:	
Cash short for the period from January 1, 1933 to October 31, 1934, appearing in ending balance sheet submitted with the return for the period ended October 31, 1934, and charged to expense and included in deduction claimed for general expense in the return for the fiscal year ended October 31, 1935	211.08
Additional deduction allowed	$ 25.58

Computation of Tax

Income Tax

Net income	$17,041.96
	[16]
Income tax liability at 13¾%	$ 2,343.27
Income tax assessed, account #January 1936—40002	646.94
Deficiency of income tax	$ 1,696.33

Excess-Profits Tax

Net income	$17,041.96
Exemption, 12½% of $20,716.96, adjusted declared value of capital stock	2,589.62
Balance	$14,452.34
Excess-profits tax liability at 5%	722.62
Excess-profits tax assessed, account #January 1936—40002	104.23
Deficiency of excess-profits tax	$ 618.39

[Endorsed]: Filed July 2, 1938. [17]

[Title of Board and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits, denies and alleges as follows:

1. Admits that the petitioner, Co-Operative Oil Association, Inc., was organized under the laws of

the State of Idaho, with its principal office and place of business at Caldwell, in the County of Canyon, State of Idaho, and that the returns for the periods involved herein were filed with the Collector of Internal Revenue at Boise, Idaho, as follows: Return for the period December 31, [18] 1933, to October 31, 1934, filed on the 14th day of March, 1935; for the period October 31, 1934, to October 31, 1935, filed on the 14th day of January, 1936, as alleged in paragraph 1 of the petition. Denies all other allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Denies that the deficiency excess profits tax liability for the period January 1, 1934, to October 31, 1934, is $487.36, as alleged in paragraph 3 of the petition. Alleges that the deficiency in excess profits tax liability for the period January 1, 1934, to October 31, 1934, is $387.36. Admits all other allegations contained in paragraph 3 of the petition.

4. (a), (b), (c), (d), (e), (f), and (g). Denies that the Commissioner erred as alleged in subparagraphs (a) to (g), inclusive, of paragraph 4 of the petition.

5. (a) For lack of information denies all material allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b) For lack of information denies all material allegations contained in subparagraph (b) of paragraph 5 of the petition.

(c) Denies the allegations contained in subparagraph (c) of paragraph 5 of the petition. [19]

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and that the petitioner's appeal be denied.

Signed J. P. WENCHEL
T M M
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:
ALVA C. BAIRD,
ARTHUR L. MURRAY,
Special Attorneys,
Bureau of Internal Revenue.

ALM:E 8/2/38.

[Endorsed]: Filed Aug. 9, 1938. [20]

[Title of Board and Cause.]

The petitioner, a cooperative marketing association organized under the Cooperative Marketing Act of Idaho, is not entitled to deductions for such "patronage dividends" as were not declared and paid during the taxable years. Farmers Union State Exchange, 30 B. T. A. 1051, followed.

Walter Griffiths, Esq. and J. L. Eberle, Esq.,
for the petitioner.

H. R. Horrow, Esq.,
for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION.

This proceeding was brought to redetermine deficiencies in the income taxes of the petitioner for the taxable year from January 1, 1934, to October 31, 1934, and for the fiscal year ending October 31, 1935, in the sums of $1,065.25 and $1,696.33, respectively, and also deficiencies in the petitioner's excess profits taxes for the same years in the sums of $387.36 and $618.39, respectively.

The sole issue is the deductibility of patronage dividends amounting to $6,872.68 for the period from January 1 to October 31, 1934, and to $11,147.30 for the year ending October 31, 1935.

FINDINGS OF FACT

The petitioner is a corporation organized in 1933 as a non-profit cooperative marketing association under the Cooperative Marketing Act of the State of Idaho, and has its principal office in Caldwell, Idaho. Its original name was Cooperative Union Oil Company of Boise Valley, State of Idaho, but on June 8, 1935, its name was changed to Cooperative Oil Association, Inc. Its charter granted to it broad general powers to purchase, sell and deal in prop-

erties of every kind but particularly petroleum products and automobile accessories and supplies.

The petitioner's authorized capital stock consisted of 5,000 shares of common stock of the par value of $1.00 each and 3,000 shares of redeemable non-voting, non-participating 6 per cent preferred stock of the par value of $5.00 each. Dividends on preferred stock are payable before other stockholders may share in the earnings and are cumulative. No stockholding patron may own more than one share of common stock nor cast more than one vote. The articles of incorporation contain the following provision:

> The net income of this corporation, except such amounts as by law are required to be set aside for reserve funds, or which may be set aside as reserve funds, by the Board of Directors or by vote of stockholders shall be distributed to the stockholding patrons of this corporation who have signed the corporation's purchasing agreement on the basis of their patronage and as shall be provided by the Board of Directors. [21]

The interest of each stockholding patron in the savings or earnings of the petitioner is determined by the amount of purchases made by him. The management of the petitioner's affairs is vested in a board of six directors. Membership in the petitioner is limited to those engaged in the production of agriculture products and is conditioned upon the

purchase of one share of common stock and the execution of a membership agreement. By that agreement members agree to purchase all gasoline and petroleum requirements from the petitioner. If the member fails so to purchase for 60 days the petitioner's board of directors may cancel his common stock and one share of his preferred stock and retain his share in the accumulated patronage dividends as liquidating damages. The agreement also provides as follows:

> * * * before distribution of patronage dividends, it is the duty of the board of directors, and they shall retain and accumulate out of the net earnings of the corporation, such amounts as in their judgment are necessary and proper to create a reserve or reserve funds necessary to provide working capital, depreciation and other reserves and the proper facilities for carrying on the business of the corporation.

Section 2, Article VIII, of the by-laws provides:

> * * * Whenever all cumulative dividends on preferred stock for all previous years shall have become payable, and the accrued dividends for the current year shall have been declared and the corporation shall have paid such cumulative dividends for previous years, and such accrued dividends for the current year, or shall have set aside from its surplus or net profits a sum sufficient for payment thereof, the board of directors may declare other divi-

dends or distribute earnings to the stockholding patrons of the corporation as hereinafter provided.

Section 1, Article IX of the by-laws is as follows:

Reserve Funds and Investments.

Section 1. Before distribution of patronage dividends herein provided for it shall be the duty of the board of directors, and they shall have the right to retain and accumulate out of the net earnings of the corporation such amounts as, in the judgment of said board of directors are necessary and proper to create a reserve or reserve funds necessary to provide working capital and the proper facilities for carrying on the business of the corporation.

Article X of the by-laws is as follows:

Net Earnings.

Section 1. The net income of this corporation except such amounts as by law are required to be set aside as reserve funds, or which may be set aside as reserve funds, or which may be set aside as reserve funds by the board of directors, or by the vote of the stockholders shall be distributed to the stockholding patrons of this corporation who have signed the corporation's purchasing agreement on the basis of their patronage and as shall be provided by the board of directors. Such patronage dividends shall be ascertained and distributed by order of the board of directors at least once during

each fiscal year of the corporation, and may be so ascertained and paid by order of said board twice each fiscal year, at the discretion of the board. [22]

When any purchase was made by a member the sales ticket covering the purchase was made out in triplicate, one copy going to the member and the other two being retained by the petitioner. Of the latter copies, one was used for accounting purposes and the other was filed in a folder which was marked with the member's name and in which all sales tickets credited to him were kept. No accounts were set up on the general ledger of petitioner relating to purchases made by members but the aggregate of such transactions was entered on its books. Two reserve accounts were kept by the petitioner, entitled "Reserve for Working Capital" and "Reserve for Contingency, Obsolescence and Extension".

On May 1, 1934, the petitioner sent to its members a circular letter containing the following statement:

> To All Members:
>
> The attached draft or credit is only a part of your savings for the six months period ending January 31st, 1934. Your board of directors considers it desirable to retain a portion of the net profits of this period for working capital. As rapidly as our reserves accumulate these earnings will be released and disbursed to you as Patronage Refunds. In the meantime the

money is being devoted to the excellent purpose of building your company and making possible larger dividends for the future.

No money was paid to members other than pursuant to resolutions of the board of directors. The portion of the current savings not released to members by authority of such resolutions was retained by the petitioner, entered on its books as "Reserve for Working Capital" and carried on its balance sheet as a liability to its members.

During the period from January 1, to November 1, 1934, the directors of the petitioner declared dividends which were paid during that year aggregating $7,864.55. The total amount of savings for the year was $14,737.21 which the petitioner took as a deduction on its income tax return for that period. During the fiscal year ending October 31, 1935, the directors declared and paid dividends aggregating $17,926.53. The total amount of savings for that year was $29,073.83 which the petitioner also took as a deduction on its return for such year.

OPINION

Van Fossan: The petitioner has made no claim that it is an exempt corporation[1]. It contends only that the full amount of savings earned is deductible. Respondent allowed the amounts actually declared as dividends during the taxable years.

---

[1]Section 101 (12), Revenue Act of 1934.

In support of this position petitioner argues that a liability to pay the entire yearly savings was created by the articles of incorporation, the by-laws, the membership agreement and that it was also recognized by the communications sent by the petitioner to its members. Petitioner overlooks, however, the provisions in the articles of incorporation that the "net income *except* such amounts as by law are required * * * or which *may be set aside as reserve funds* by the Board of Directors * * * shall be distributed * * *" (italics are by the Board). This exception is repeated in Section 1, Article X of the by-laws and is amplified in [23] Section 1, Article IX thereof. The membership agreement contains a similar repetition of the same required procedure. In keeping with this provision the Board of Directors excluded a certain portion of the petitioner's earnings and placed it in the account entitled "Reserve for Working Capital."

The petitioner further argues that each member's interest in the reserve fund is ear-marked by the ticket system of entries and concludes that he thereupon acquired ownership of his proportionate part of the savings so segregated and used. We are unable to agree. In Farmers Union State Exchange, 30 B. T. A. 1051, we said:

> * * * We are of the opinion, however, that the charter provision alone cannot be construed as creating in each year a definite liability to pay the entire savings of that year, or any particu-

> lar part thereof, to the patrons. In order to make the liability sufficiently definite to permit a deduction of any amount there should have been some declaration or act on the part of the directors with respect to payment of patronage dividends. In the absence of evidence that any such declaration or act was made or done, we hold that the Exchange is not entitled to any deduction from income for 1917 and 1918 on account of patronage dividends which were not declared or paid.

We make the same holding here. In the absence of some definite act of appropriation, petitioner is not entitled to deduct the accumulated earnings as dividends.

Decision will be entered for the respondent.

Enter:

Entered July 7, 1939. [24]

United States Board of Tax Appeals
Washington

Docket No. 94580.

CO-OPERATIVE OIL ASSOCIATION, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Board, as set forth in its Memorandum Findings of Fact and Opinion entered July 7, 1939, it is

Ordered and Decided: That there are deficiencies in income tax for the year from January 1, 1934 to October 31, 1934 and for the fiscal year ending October 31, 1935 in the amounts of $1,065.25 and $1,696.33, respectively; and deficiencies in excess profits tax for the same years in the amounts of $387.36 and $618.39, respectively.

Enter:

Entered Jul 10 1939.

[Seal] (Signed) ERNEST H. VAN FOSSAN
Member. [25]

[Title of Board and Cause.]

PETITION FOR REVIEW BY UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT OF DECISION BY UNITED STATES BOARD OF TAX APPEALS.

Co-Operative Oil Association, Inc., Petitioner in this cause, by Walter Griffiths and J. L. Eberle, counsel, hereby files its petition for a review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision by the United States Board of Tax Appeals, rendered on July 10, 1939, in the above entitled matter, determining deficiencies in Petitioner's federal income taxes for the year from January 1, 1934, to October 1, 1934, and for the fiscal year ending October 31, 1935, in the amounts of $1,065.25 and $1,696.33, respectively, and deficiency in the excess profits taxes for the same years in the amounts of $387.36 and $618.39, respectively; and respectfully shows: [26]

I.

That Petitioner, Co-operative Oil Association, Inc., is a corporation duly organized and existing under and by virtue of the Co-operative Marketing Act of the State of Idaho, under Chapter 20, Title 22, Idaho Code Annotated, with its principal office in Caldwell, Canyon County, State of Idaho; that Petitioner declares the court in which such review is sought to be the United States Circuit Court

of Appeals for the Ninth Circuit, and seeks review of said decision by such court, inasmuch as, and Petitioner alleges, the Collector's office, to wit: Boise, Idaho, to which were made the returns of the taxes in respect of which the liability involved herein arises, is located in said Ninth Circuit.

II.

Nature of Controversy

The controversy involves the proper determination of petitioner's liability for federal income taxes for the year from January 1, 1934, to October 1, 1934, and for the fiscal year ending October 1, 1935, and excess profits taxes for the same years.

Petitioner is a cooperative association organized under the Co-operative Marketing Act of the State of Idaho, which provides that no association organized thereunder is [27] organized for profit either for itself or for its members as such but only for its members as producers; that during the years above mentioned petitioner secured supplies for its members, producers of agricultural products, and received the difference between the general market price of such supplies and their cost through mass purchasing, which difference or savings belonged to such members, although no distribution was made of such savings involved in this matter during said years. Such undistributed savings, belonging to Petitioner's members, became and were obligations and liabilities of Petitioner for such members. Accordingly they were deducted by Petitioner from its

gross income in the amounts of $6,872.68 and $11,-147.30, in the periods above mentioned, respectively.

The Commissioner of Internal Revenue held that, inasmuch as these savings had not been distributed by express direction or resolution of the Board of Directors during the periods of time above mentioned, tax thereon must be paid and disallowed the deductions claimed by Petitioner and determined the deficiencies as aforesaid. The United States Board of Tax Appeals affirmed the Commissioner's ruling, and review of such decision is hereby sought.

III.

The said Co-operative Oil Association, Inc., Petitioner herein, being aggrieved by the findings, conclusions and opinion of the United States Board of Tax Appeals, and by [28] its decision entered pursuant thereto, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Ninth Circuit.

IV.

ASSIGNMENTS OF ERROR

That Petitioner assigns as error the following acts and omissions of the Board of Tax Appeals:

1. The failure to allow as a deduction from Petitioner's gross income for the taxable year January 1, 1934, to October 31, 1934, members' savings in the sum of $6,872.68;

2. The failure to allow as a deduction from Petitioner's gross income for the taxable year October

31, 1934, to October 31, 1935, members' savings in the sum of $11,147.30;

3. The failure to find and hold that there was nothing in Petitioner's Articles of Incorporation, By-laws, Marketing Agreement, and in the Co-operative Marketing Act of the State of Idaho, which would permit said members' savings, thus disallowed, to accrue as such, without corporate action setting them apart as a liability of Petitioner to its members;

4. The holding that the deduction for such members' savings by the Petitioner should be limited to amounts which were separately declared or paid during the taxable year; [29]

5. The failure to hold, find and determine that under, pursuant to and by virtue of the Co-operative Marketing Act of the State of Idaho and the Articles of Incorporation and By-laws of Petitioner, and its Membership Agreement between it and its members, the items disallowed, as hereinbefore mentioned, for members' savings in the sum of $6,872.68, for the taxable year ending October 1, 1934, and in the sum of $11,147.30, for the taxable year ending October 31, 1935, accrued as obligations from petitioner to its members without further corporate action;

6. The failure to hold and recognize the liability of Petitioner to its members for the amounts evidenced by the items disallowed, as hereinbefore mentioned, which liability was fixed by the Co-

operative Marketing Act of the State of Idaho, Articles of Incorporation, By-laws, and Marketing Agreement of Petitioner;

7. The failure to find and hold that the funds evidenced by the items disallowed, as hereinbefore mentioned, were savings of Petitioner's members, belonging to such members, and were not the property of this Petitioner.

8. In holding that there was required corporate action by the Board of Directors of the Petitioner to distribute such savings and to make the same a liability of Petitioner. [30]

9. In finding and holding that there are deficiencies in income taxes for the year from January 1, 1934, to October 31, 1934, and for the fiscal year ending October 31, 1935, in the amounts of $1,065.25 and $1,696.33, respectively; and in finding and holding that there are deficiencies in excess profits taxes for the same years, in the amounts of $387.36 and $638.39, respectively.

WALTER GRIFFITHS
Residence: Caldwell, Idaho,
J. L. EBERLE
Residence: Boise, Idaho,
Counsel for Petitioner.

United States of America
State of Idaho
County of Ada—ss.

J. L. Eberle, Being first duly sworn, on oath deposes and says:

That he is counsel of record in the above cause; that as such counsel he is authorized to verify the foregoing Petition for Review; that he has read the said petition and is familiar with the statements contained therein, and that the statements made are true to the best of his knowledge, information and belief.

J. L. EBERLE

Subscribed and sworn to before me this 3rd day of October, 1939.

[Seal] CHAS. H. DARLING
Notary Public for Idaho,
Residence: Boise, Idaho.

[Endorsed]: Filed Oct. 5, 1939. [31]

[Title of Board and Cause.]

STATEMENT OF EVIDENCE

Following Is a Statement Of evidence submitted to the Board of Tax Appeals in the above mentioned case, so far as is necessary to the assignments of error as filed, reduced to narrative form:

GEORGE A. BARRETT,

a witness on behalf of Petitioner, testified as follows:

(Direct Examination)

"I am associated with Petitioner, Co-operative Oil Association, in the capacity of General Man-

(Testimony of George A. Barrett.)

ager, and as such have general charge of its business. I am familiar with all of its operations, and the mechanics of the handling of its business, and its books and records are kept and maintained under my supervision.

"Petitioner's Exhibit No. 1 is a certified copy of the Articles of Incorporation of Petitioner in effect during the periods involved in this matter. [32]

"There have been two amendments to the Articles of Incorporation. The first was made in 1933. The amount of capital stock was changed on the 11th day of June, 1935. These changes appear in Petitioner's Exhibit No. 1.

"Prior to June 8, 1935, the name of the Petitioner was 'The Cooperative Union Oil Company of Boise.'

PETITIONER'S EXHIBIT No. 1.

AMENDED ARTICLES OF INCORPORATION
OF
COOPERATIVE UNION OIL COMPANY
OF BOISE VALLEY, STATE OF IDAHO

* * * *

Know All Men by These Presents:

That we, the undersigned constituting all the directors of Cooperative Union Oil Company of Boise Valley, State of Idaho, a corporation, organized under the laws of the State of Idaho, and all residents and citizens of the State of Idaho, engaged in

(Testimony of George A. Barrett.)

the production of agricultural products, do hereby voluntarily, and pursuant to authorization of a majority vote of the stockholders and members of said corporation, at a regular meeting thereof duly called and held in the City of Caldwell, Idaho, on the 5th day of August, 1933, at which meeting said stockholders and members by a majority vote decided to accept the benefits of and be bound by the provisions of Chapter 20 I. C. A. 1932, associate ourselves together with such other person or persons as may hereafter become associated with us, into and for the purpose of forming and incorporating a non-profit cooperative marketing association under the provisions of the Cooperative Marketing Act of the State of Idaho, and for the purpose of enabling said corporation, the stockholders and members thereof to become and operate as such non-profit cooperative marketing association, and for those purposes and to those ends, we hereby make, subscribe and execute the following Articles of Incorporation [55] of said association, and we hereby certify in writing, as follows:

* * * * * * *

Article II.

That the purposes and objects for which said corporation is formed are:

(a) To acquire, receive, own, hold, manage, operate, sell, convey, lease, mortgage, encumber, pledge, assign and transfer for its members and

(Testimony of George A. Barrett.)

stockholders, all properties of every kind and nature, both real, personal and mixed, including minerals, petroleum, petroleum products, oil, vehicles of every kind and nature, including motor vehicles, and automobile and motor accessories, parts and supplies, and all forms of rights and obligations of other corporations, forms and individuals, and to acquire, establish, engage and deal in, manage, carry on and conduct, sell and dispose of any business or enterprise for any or all of said purposes in any form whatsoever, and to engage in, manage, carry on and conduct, any business or enterprise which the board of directors may determine to be for the best interests of the corporation, its members and stockholders, and authorized and not forbidden by the Cooperative Marketing Act of the State of Idaho, and with [56] all the powers conferred upon Cooperative Marketing Associations by the laws of the State of Idaho; to engage in any activity in connection with the purchasing, hiring, manufacturing, mortgaging, storing, handling, selling or use, to, by, or for its members and stockholders of merchandise, supplies, machinery and equipment including the merchandise, supplies, machinery and equipment in these Articles of Incorporation specifically mentioned; or in the financing of any such activities, or in any one or more of the activities specified in these Articles of Incorporation; to do business with non-members in an amount not to exceed that done with members. [57]

(Testimony of George A. Barrett.)

(j) To do each and every thing necessary, suitable or proper for the accomplishment of any one of the purposes or the attainment of any one or more of the objects herein enumerated; or conducive to or expedient for the interest or benefit of the Association; and to contract accordingly, and in addition to exercise and possess all powers, rights and privileges necessary or incidental to the purposes for which the Association is organized, or to the activities in which it is engaged; and in addition, any other rights, powers and privileges granted by the laws of this state to ordinary corporations, except such as are inconsistent with the express provisions of the Cooperative Marketing Act of the State of Idaho, and to do any such thing anywhere, both within and without the State of Idaho. [59]

(l) The foregoing clauses shall be construed both as objects and powers, but no recitation, expression or declaration of specific or special powers or purposes herein enumerated shall be deemed to be exclusive and shall not be held to limit or restrict in any manner the powers granted by the laws of the State of Idaho to Cooperative Marketing Associations; but it is hereby expressly declared that all lawful powers not inconsistent therewith are hereby included. [60]

Article V.

That the capital stock of this corporation authorized to be issued shall be five thousand (5000) shares

(Testimony of George A. Barrett.)

of common stock of the par value of One Dollar $1.00) per share and of the aggregate par value of Five thousand dollars ($5000.00), which said common stock shall be non-interest bearing, and three thousand (3000) shares of non-voting, non-participating, preferred shares of the par value of Five Dollars ($5.00) each, and of the aggregate par value of Fifteen Thousand Dollars ($15,000.00). Shares of preferred stock shall entitle the owners thereof to receive when and as declared from the surplus and net profits of the corporation, yearly dividends at the rate of not to exceed six per cent (6%) per annum from the date of issue. The dividends on such preferred stock shall be cumulative, and shall be payable before any other dividends shall be paid or set apart; so that, if in any year dividends shall not have been paid thereon, the deficiency shall be payable, before any other dividend or distribution of earnings shall be paid to members. Whenever all cumulative dividends on preferred stock for all previous years shall have become payable, and the accrued dividends for the current year shall have been declared, and the corporation shall have paid such cumulative dividends for previous years and such accrued dividends for the current year, or shall have set aside from its surplus or net profits, a sum sufficient for payment thereof, the Board of Directors may declare other dividends or distribute earnings to the stockholding patrons of the corpora-

(Testimony of George A. Barrett.)

tion as hereinafter provided. [61] On a dissolution of the corporation, voluntarily or otherwise, the holders of preferred stock shall be entitled to have their shares redeemed at par, together with accrued dividends thereon, to the date of dissolution, before any distribution of any part of the assets of the corporation shall be made to the members of this association on account of their common stock. The shares of preferred stock shall confer no right to vote upon the owners thereof, at any meeting of the stockholders, or to participate in the management of the affairs of the corporation. Said preferred stock shall be subject to redemption at the option of this corporation at not less than par and accrued interest at any time, following the date of issue.

The net income of this corporation, except such amounts as by law are required to be set aside for reserve funds, or which may be set aside as reserve funds, by the Board of Directors or by vote of stockholders shall be distributed to the stockholding patrons of this corporation who have signed the corporation's purchasing agreement on the basis of their patronage and as shall be provided by the Board of Directors.

Shares of common stock shall entitle the owners thereof to vote on all questions at stockholder's meetings. Not more than one share of common stock may be held by any one person.

(Testimony of George A. Barrett.)

Both common and preferred stock shall be paid for at such times and in such manner as the by-laws of this corporation shall direct, and no stock shall be issued for less than its par value or until the same has been paid for in cash [62] or its equivalent and such payments have been deposited with the treasurer of this association.

Each common stockholder shall be restricted to only one vote in the affairs of this corporation; provided, however, that voting by proxy shall not be permitted, but in case the Board of Directors shall so authorize, the common stockholders may vote by mail in accordance with such rules and regulations as shall be adopted by the Board of Directors.

Shares of stock may be transferred in the manner provided by law, provided, however, that no shares of common stock may be sold or transferred on the books of the corporation without the approval of the Board of Directors or to anyone not qualified to become a member or who has not signed the corporation's purchasing agreement; provided, further however, the corporation reserves the right to purchase its common stock as provided by the Cooperative Marketing Act of the State of Idaho. [63]

* * * * * * *

Article IX.

The private property of a member shall not be subject to the payment of corporate debts; and, ex-

(Testimony of George A. Barrett.)

cept for debts lawfully contracted between him and the association, no member shall be liable for the debts of the association to an amount exceeding the sum remaining unpaid on his stock, including any unpaid balance on promissory notes given in payment therefor.

[Endorsed]: Petitioner's Exhibit No. 1. Admitted in evidence Nov. 1, 1938. [65]

"Exhibit No. 2 is Petitioner's income tax return for the period December 31, 1933, to October 31, 1934, and Exhibit No. 3 is Petitioner's return for the period November 1, 1934, to October 31, 1935.

PETITIONER'S EXHIBIT No. 2

INCOME TAX RETURN FOR YEAR 1934

* * * * * * *

The reserves for working capital of $10,040.51 is composed of $1,042.81 savings on non-member business and $8,997.70 savings on member business and will be distributed at some future date.

* * * * * * *

[Endorsed]: Admitted in evidence Nov. 7, 1938. [78]

"Petitioner's Exhibit No. 4 is a certified copy of Petitioner's By-laws during the periods involved in this matter.

(Testimony of George A. Barrett.)

PETITIONER'S EXHIBIT No. 4

AMENDED BY-LAWS

of the

COOPERATIVE UNION OIL COMPANY OF BOISE VALLEY, STATE OF IDAHO. [89]

* * * * * * *

Article III.

Membership.

Section 1. Any person engaged in the production of agricultural products, upon the purchase of one share of the common stock of this corporation and by signing the corporation's purchasing agreement and by subscribing to such rules and regulations as may be required by the corporation shall become of record a member of this corporation. All members in becoming such agree to purchase all their gasoline and other petroleum requirements from this corporation. [91]

* * * * * * *

Article VIII.

Stock Certificates. [97]

* * * * * * *

Section 4. Shares of common stock shall entitle the owners thereof to vote on all questions at stockholders' meetings. Not more than one share of common stock may be held by any one person.

* * * * * * *

Section 6. Each common stockholder shall be restricted to only one vote in the affairs of this cor-

(Testimony of George A. Barrett.)

poration; provided however, that voting by proxy shall not be permitted, but in case the board of directors shall so authorize it, the members may vote by mail in accordance with such rules and regulations as shall be adopted by the board of directors.

[98]

* * * * * * *

Section 8. No purchaser at an execution sale or any other person who may succeed by operation of law or otherwise to the property interest of a member shall be entitled to membership or to become a member of the association by virtue of the transfer of stock in such manner. The board of directors of the association may, however, consent to any assignment and transfer and the acceptances of the assignee or transferee as a member of the association.

[99]

* * * * * * *

Section 11. The net income of this association, except such amounts as by law are required to be set aside for reserve funds or which may be set aside as reserve funds by the board of directors or by a vote of stockholders shall be distributed to the stockholding patrons of this association who have signed the associations purchasing agreement on the basis of their patronage and as shall be provided by the board of directors.

* * * * * * *

(Testimony of George A. Barrett.)

Article IX.

Reserve Funds and Investments.

Section 1. Before distribution of patronage dividends herein provided for it shall be the duty of the board of directors, and they shall have the right to retain and accumulate out of the net earnings of the corporation such amounts as, in the judgment of said board of directors are necessary and proper to create a reserve or reserve funds necessary to provide working capital and the proper facilities for carrying on the business of the [100] corporation.

* * * * * * *

Article X.

Net Earnings.

Section 1. The net income of this corporation except such amounts as by law are required to be set aside as reserve funds, or which may be set aside as reserve funds, or which may be set aside as reserve funds by the board of directors, or by the vote of the stockholders shall be distributed to the stockholding patrons of this corporation who have signed the corporation's purchasing agreement on the basis of their patronage and as shall be provided by the board of directors. Such patronage dividends shall be ascertained and distributed by order of the board of directors at least once during each fiscal year of the corporation, and may be so

(Testimony of George A. Barrett.)

ascertained and paid by order of said board twice each fiscal year, at the discretion of the board.

Article XI.

Marketing Contracts.

The company, through its board of directors, may make and execute marketing, purchasing and selling contracts not inconsistent with the provisions of law.

[Endorsed]: Petitioner's Exhibit No. 4. Admitted in evidence Nov. 1, 1938. [101]

"The principal products delivered by Petitioner are gasoline, oil, tires, grease and various accessories. Petitioner has members and issues common stock, which, as a matter of fact, is a Membership Certificate. In accordance with the By-laws all members enter into marketing agreements with Petitioner. Petitioner's Exhibit No. 5 is the form of such marketing agreement used during the periods involved in this matter.

PETITIONER'S EXHIBIT NO. 5

Certificate

I, C. A. Oliason, Secretary of the Cooperative Oil Association, Inc. (formerly the Cooperative Union Oil Company of Boise Valley) do hereby certify that the annexed is a full, true and complete copy

(Testimony of George A. Barrett.)

of the Membership Contract used during 1934 and 1935 by the above named corporation.

Signed:

[Seal] C. A. OLIASON

Secretary [104]

PURCHASING AGREEMENT AND APPLICATION FOR MEMBERSHIP AND SUBSCRIPTION FOR STOCK IN COOPERATIVE UNION OIL COMPANY OF BOISE VALLEY, STATE OF IDAHO.

(Common Stock $1.00 Per Share, Preferred Stock $5.00 Per Share)

I, (we) hereby apply for membership in the Co-operative Union Oil Company of Boise Valley, State of Idaho, an Idaho Corporation, and agree to purchase at par, and to pay for, upon the acceptance of this application by the said corporation, for one share of said corporation's common stock of the par value of $1.00 and.....shares of its preferred stock of the par value of $5.00 per share.

This agreement is executed by me (us) with full knowledge of the contents of the articles of incorporation and by-laws of said corporation, which I, (we) hereby ratify, confirm and approve and accept as binding upon me (us) in all their terms, and as further consideration for the acceptance of this application and allotment of shares herein subscribed for, or any part thereof, I (we) agree to purchase

(Testimony of George A. Barrett.)

all my (our) requirements of gasoline, oil and other petroleum products from said corporation from the time such products are available for distribution to me (us) by said corporation, and so long as I (we) use petroleum products in the territory served by said corporation and provided said products are available for convenient distribution to me (us); and in the event I, (we) fail or refuse to so purchase said products as herein agreed, for a continuous period of 60 days, I, (we) understand and agree that the board of directors of said corporation have full authority to cancel the common stock and one share of preferred stock so issued to me (us) hereunder, together with dividends accrued or accruing thereon, and that in addition thereto said corporation shall retain all unpaid patronage dividends, all as liquidated damages for my (our) failure to comply with my (our) agreement herein contained to so purchase said requirements.

I, (we) understand and agree that said corporation has an authorized capital stock of 5000 common shares of the par value of $1.00 each and 3000 preferred shares of the par value of $5.00 each; that the common stock is non-interest bearing and entitles the owner to one vote on all questions at stockholders' meetings; that not more than one share of common stock may be held by any one person; that voting by proxy is prohibited; that in the case of liquidation, all the net assets after payment

(Testimony of George A. Barrett.)

of dividends on preferred stock and payment of patronage dividends, are to be divided among the common stock; that common stock is not transferable without the approval of the board of directors of said corporation or until the corporation has been given the first right to purchase same; that preferred stock draws dividends at the rate of 6% per annum from date of issue, payable out of the net profits before any other dividends may be declared and does not participate in any of the other profits of the corporation and is non-voting, non-participating and non-cumulative and is subject to redemption at the option of the corporation at not less than par at any time following the date of issue; that before distribution of patronage dividends, it is the duty of the board of directors, and they shall retain and accumulate out of the net earnings of the corporation, such amounts as in their judgment are necessary and proper to create a reserve or reserve funds necessary to provide working capital, depreciation and other reserves and the proper facilities for carrying on the business of the corporation.

I, (we) understand and agree that shares of stock when issued shall be fully paid and non-assessable and that this application and agreement shall become binding and be effective immediately upon its acceptance by the corporation.

(Testimony of George A. Barrett.)

Dated this.....day of....., 193.....

.....

.....

Address.....

Accepted and approved this.....day of....., 193.....

COOPERATIVE UNION OIL COMPANY OF BOISE VALLEY, STATE OF IDAHO.

By.....

[Endorsed]: Petitioner's Exhibit No. 5. Admitted in evidence Nov. 7, 1938. [105]

"In the handling of supplies in the nature of petroleum products the mechanics used by Petitioner in keeping a record of the relationship of members with Petitioner, were as follows: [33]

"A sales ticket is made out in triplicate, the member receiving a copy and the other two copies going to Petitioner's office; one of these tickets is filed in the member's folder, under the member's name, each member having such a folder; and the other copy of the ticket is used for general accounting purposes in the office. Each individual member has a separate folder. The Board of Directors meets monthly and a financial report is submitted, on which report there is shown the savings of the

(Testimony of George A. Barrett.)

members for the particular month. These accumulate through the year, month by month, and at the end of the year these savings are set up as a liability to the members by Petitioner. The savings, then, are shown each month in this statement, and, taken in connection with the folders showing the patronage of individual members, the savings of members are carried as 'Group One Account.' These savings of Petitioner's members are kept in one account in connection with the folders of individual members. From time to time Petitioner would release portions of these savings. The savings for the year were divided by the gross business in dollars of the member and that would determine percentage. It is an easy matter then to take the quota of each member's trade and figure it out on the basis of these percentages. [34]

"The Association from time to time would send circulars to members. These would sometimes be sent out with the sums which would be released out of these savings. Petitioner's Exhibit No. 7 is one of these circulars thus sent out to members by Petitioner. Petitioner's Exhibit No. 8 is likewise one of such circulars sent out by Petitioner to its members.

(Testimony of George A. Barrett.)

PETITIONER'S EXHIBIT No. 7

Cooperative Union Oil Company of Boise Valley
Caldwell, Idaho
May 1, 1934

To All Members:

The attached draft or credit is only a part of your savings for the six months period ending January 31st, 1934. Your board of directors considers it desirable to retain a portion of the net profits of this period for working capital. As rapidly as our reserves accumulate these earnings will be released and disbursed to you as Patronage Refunds. In the meantime the money is being devoted to the excellent purpose of building your company and making possible larger dividends for the future.

If you have not heretofore received your Stock Certificates, they will be contained herein. Will you kindly sign the self-addressed and stamped receipt card and mail? This is Important, as we must know that you have received your stock.

In case you gave a note for your preferred stock your dividend will be credited on the note. The attached statement will show amount still due if any. You will assist your company to render greater service if you can see your way clear to pay any balance still due on your note and your stock can then be issued to you and will earn you interest.

Your Co-operative Oil Company has just completed its first year of active service. This year has

(Testimony of George A. Barrett.)

been one of wonderful growth and is an outstanding example of the value to producers of cooperative purchasing organizations. Through this organization, you are building your own oil company, setting aside working capital and acquiring valuable assets in addition to your Patronage Refunds.

It is possible for the Cooperative Union Oil Company to become one of the largest institutions in Boise Valley—returning hundreds of thousands of dollars to its members in Patronage Dividends and to prove an outstanding example of Farmer Accomplishment through organization. On the other hand, it may prove a failure. We, as members, will write the verdict. By neglect and indifference; by allowing ourselves to be influenced by plausible misstatements of those who would profit by our defeat; by refusal to stand by our company in time of need, we will accomplish our own destruction. Just as truly we may, through our interest and enthusiasm, by our loyalty and determination, bring about a most glorious future.

Your board of directors and management extend to all members a most grateful appreciation for the fine spirit of loyalty and cooperation thus far received.

COOPERATIVE UNION OIL COMPANY
Manager GEO. BARRETT

[Endorsed]: Petitioner's Exhibit No. 7. Admitted in evidence Nov. 7, 1938. [118]

(Testimony of George A. Barrett.)

PETITIONER'S EXHIBIT No. 8

"Over-production is a money cry, not a human cry. Never yet has enough of any good thing been produced."—Henry Ford.

[Trademark]

Contents
Co-operative Thoughts
Beginnings
By Hugh J. Hughes
Consumer Co-operation
By Geo. G. Barrett
Statement of Operations.

Co-operative
Union Oil Company
of Boise Valley
Office
Caldwell, Idaho [119]

Co-operative Thoughts

"On the cold, windswept shore of Lake Michigan stands a bleak monument to the short sightedness of man. The 'Century of Progress' is no more. The profit system rallied its forces for one last great show. The engineers of the world brought the products of a century of toil to the market place—and the people came and saw and retreated again into poverty. For those who had taught the world how

(Testimony of George A. Barrett.)

to produce had failed to teach it how to consume." —Magazine, Co-operation.

"We now witness the spectacle of our master political and business minds—we may call them our master midwives—sitting by the bedside of capitalism in travail, waiting for a future that refuses to be born. While in our Co-operative household we behold our lusty infant advancing toward adolescence."—Dr. J. P. Warbasse, President National Co-operative League.

"Co-operation proposes to recover private ownership of property for the people. It is Capitalism which has caused us to lose individual ownership. Co-operation will recover it. Co-operation stands against private-profit, but supports private property."—E. R. Brown, Secretary National Co-operative League.

"The economic savings of (Consumer) Co-operation in the United States represents only a little stream, shunted off from the great current of profit. But this stream is growing larger. The surplus saving effected by our consumer societies last year amounted to about $30,000,000.00. That we may think of as a beginning and an encouragement."—Dr. J. P. Warbasse.

"The purposes of the Co-operative League should be made clear to all. It is organized to help bring into universal existence the fourth great economic system in the world's history—the first of which was Slavery, the second, Serfdom, the third, Capi-

(Testimony of George A. Barrett.)

talism, the fourth, the Coming System of Co-operation."—E. R. Bowen.

"Until you farmers realize and grasp the power which you possess to control the price of the commodities you have to buy on a parity with the price of things you have to sell, you will never have prosperity."—Glen H. Anderson, Washington Egg Association.

If Capitalism had been satisfied with a reasonable share of the wealth, there would have been no Consumer revolt. Demanding as it does all of the producer's goods through the avenues of profits, interest and taxes, there is no defense except through Consumer Co-operation. [120]

Beginnings

A ship plowing the Indian Ocean, carrying tea; another dipping through the choppy waves of the North Sea, bringing bacon; still a third nosing through the mists of the North Atlantic, loaded to the plimsoll line with wheat; a fourth coming up over the rim of the world, her hold bulging with wool, her cold storage full of butter—ships bound from far sundered lands to the mother-isle of Co-operation, that there Co-operative millions may be clothed and fed. Great warehouses where the ships come in. Mills where the grain is ground into flour, where the tea is made ready for use, where the wool is turned into thread and the thread into cloth.

(Testimony of George A. Barrett.)

This on the banks of the Mersey, where, in the great modern city of Manchester rises the vast business center of the English Co-operative Wholesale Society with its six million members in England and Wales alone. In Scotland, at Glasgow, stands its twin, the home of the Scottish Wholesale. Over in Ireland where the Irish Agricultural Wholesale Society began but yesterday (1918), they will tell you that the paid-in shares of the Co-operatives in Great Britain and Ireland amount to more than $150,000,000. They will tell you that the investment of these great enterprises exceeds $750,000,000.

Across the Straits of Dover are the Co-operatives of the Low Countries and France and Germany, and Central Europe; down in Egypt, in far-away India and Japan the movement is growing—Co-operatives fashioned after the Great Plan of the Pioneers, the Twenty-eight Weavers of Rochdale.

And all this in the brief span of one hundred years, out of nothing except the faith born in man that he is made for better ends than to be a slave—out of a belief that those who create the wealth of the world are intelligent enough to use that wealth to their own well-being and to the benefit of the rest of mankind.

No capitalist advanced the money that built the ships that bring home to England the bacon and the wool and the butter and the wheat. No bankers pooled their resources to pile, stone on stone the warehouses that tower above the Mersey. Out of

(Testimony of George A. Barrett.)

the penny here and the six-pence there and the shilling yonder, they were fitted together—just as the Co-operative stores and warehouses of America have been laid, board by board, and shingle by shingle out of Co-operative faith and practice.

—Hugh J. Hughes.

Additional copies of this folder may be obtained by writing this company, Caldwell; or send us names and addresses of persons you think would be interested and the folders will be mailed. [121]

The following paper was read at the annual meeting of the Co-operative Union Oil Company of Boise Valley by its manager, Geo. G. Barrett, and by resolution was ordered printed and distributed to the members:

Consumer Co-operation

The Consumer Co-operative Movement had its beginning among surroundings as humble and obscure as that of the Christian religion. Out of their bare necessity, the Twenty-eight Weavers of Rochdale wove an economic pattern that blends perfectly into the needs of humanity today. Amidst poverty and oppression, they formulated principles and precepts for a successful Consumer movement which has endured ninety years and has spread out over the whole world.

(Testimony of George A. Barrett.)

Consumer Co-operation was not born of selfishness and greed; nor is it nurtured by envy and hate. It glories not in the misfortune of those it supplants; but rather extends to all alike the brotherly hand of assistance. It is a revolution not either of ballots or bullets; but of quiet assimilation and growth. It progresses not by means of voluminous, misleading publicity; nor does maudlin sentiment have a place in its literature. Consumer Co-operation stands before the world tried by the fire of ninety years of relentless opposition and lays claim to the support of thoughtful men and women proved by the test of experience and sustained by logic and reason.

The Profit System Versus Co-operation. Periodically occurring "hard times," "depressions," "financial panics" and the accompany hardship, suffering and wretchedness of millions of people are the necessary and unescapable fruits of the profit system of economics. Consider for a moment a world in which there is only one industry, and further that this world is composed of just ten men. One of these men is the owner of a bakery and the other nine work for him. We will say that each worker produces each day four dollars worth of bread, but is paid only three dollars for his labor. The other dollars' worth of bread produced by each worker is the profit that goes to the owner of the bakery. The nine workers with their three dollar wages, obviously can purchase only three-fourths the output of the bakery. The owner has one-fourth of the entire

(Testimony of George A. Barrett.)

output as profit but his appetite is probably no greater than that of the workers and he cannot consume his portion of the output. Very shortly, an artificial surplus is created on account of the inability of the workers to repurchase their rightful or needful portion of the products of their labor. As the artificial surplus increases, the time comes when the bakery will have to close down and the nine men are out of employment.

Now let us move up beside and parallel with the bakery business, the steel industry, the boot and shoe industry, the clothing industry and every other industry of the human race, and we will find the same factors and conditions coming to pass. The workers—the consumers—creating a greater [122] wealth of commodities than they can repurchase with their income, and the owners unable to consume their portion of the products—the profit. Artificial surpluses are created in every line—factories, mill, and farms are shut down and men thrown out of employment—and again the cycle is complete and we have hard times and depression.

Farseeing men and women have said for a long time that there is no surplus; that the fault is lack of distribution, and they are right. But we have just shown that under the profit system faulty distribution can never be corrected, and artificial surpluses will always be created.

How different it would be under a Co-operative Consumers' Commonwealth! Going back to the

(Testimony of George A. Barrett.)

original example of one industry and ten men, we find that instead of nine workers and one owner, all ten of the men, as co-operators, would be owners and workers. They would receive back all the value of the products of their labor and no surplus would be created. Under a co-operative system, the profits are redistributed to the workers and consumers and those that create the wealth of the world would have the wherewith to buy back and repurchase all the products of their labor. With the purchasing power thus distributed back to the workers who create the wealth, never could too much of any good thing be produced. Periodic artificial surpluses could not occur.

Inventions and Discoveries. In these days we hear much of inventions, new discoveries and labor saving machinery as things of evil and that they are a curse to mankind. Under the profit system it is possible that mechanical progress be used for the enslaving of the workers and that condition has at least partially come to pass.

Under the profit system, a machine is installed in a factory that does away with four employees. Consider that each of these men have heretofore earned fifteen hundred dollars a year or six thousand dollars a year altogether. The installing of the new machine throws the four men out of employment and lessens the buying power of the community by six thousand dollars. The owner of the factory receives six thousand dollars more in profit,

(Testimony of George A. Barrett.)

but his appetite and consuming power is not, however, increased whatever. Therefore under our present system new inventions and machinery and discoveries are often used to aggravate the already fatal fault and weakness of the profit system. Under the co-operative system, the labor saving machine would be installed just the same, but the benefits of this machine would be distributed back to the workers and consumers. The buying power of the community would be unchanged. The only effect upon the community would be lessened hours of labor or greater output of the things humanity demands.

It is impossible for the human race to produce more than the human race can consume under a proper system of distribution. Human wants and desires must continually exceed and out-distance the ability of the human race to produce. Labor saving [123] machinery which under the profit system might, and sometimes does become a curse to the human race, under co-operation becomes a God-given blessing.

The Creator did not condemn mankind to misery and want. Rather He made of the earth a plentiful garden wherein was the fulfillment of every human need. Poverty and want are the creation of man and are the creatures of selfishness and greed. Man, "created in the image of God," and endowed by his Creator with the faculties of thought and invention may yet again regain the "Paradise Lost."

(Testimony of George A. Barrett.)

The Consumer and Industry. It can readily be shown that under the profit system, the consumers of the world buy out all industry every four years, and then give it back. Estimating the net profit of the manufacturer, the net profit of the jobber and the net profit of the retailer, all combined to equal twenty-five per cent of the selling price; then the consumer pays sufficient, in addition to the actual cost of the goods, to buy out all industry every four years. And at the end of the four years, they have nothing whatever to show for the profit that they have paid in upon each purchase they have made.

Under the co-operative system, consumers would retain or be given back as patronage dividends all these profits and it is theoretically possible in the four year period for consumers to own all industry. Coming nearer home and taking for example our own oil company here, we can begin to see the possibilities of consumer co-operation. Beginning without capital, without facilities, without knowledge or experience of the industry, your oil company has been able in the short period of twenty months to make savings to ourselves of nearly thirty thousand dollars which now belongs to each of us proportionately to each of our purchases. Had our company not been operating, this large sum of money would now be in the pockets or bank accounts of those who grow rich through profits. The purchase of petroleum products and automobile accessories is only one small avenue of our expenditures. Suppose we were

(Testimony of George A. Barrett.)

saving these profits on all our expenditures, and consider further that we were to advance to the extent of manufacturing and producing as well as jobbing and retailing—then the possible benefit of consumer co-operation becomes a field of vast proportions.

Freedom. No one must be compelled to join a co-operative and likewise no one should be compelled to remain a member of a co-operative if or when he becomes dissatisfied or antagonistic. Governments of States or Nations cannot successfully initiate co-operative organizations. The very fact of their prerogative to compel their subjects to become members and to obey their dictates, is entirely foreign to co-operative principles. Communism and Fascism have the inherent weakness that they destroy individual liberty. Government ownership and government control likewise are subversive of the spirit of freedom. These governmental experiments trying to solve the problem of modern economics tend to build up vast overhead expenses; to create great [124] bureaus of unnecessary employees and finally lead to dictatorship and autocratic domination of the people. Communism and Government ownership take away the right of private property and make the human being simply a creature or pawn of the State.

Co-operation on the other hand glories in individual freedom; in economies of administration; in democratic control and ownership by the people

(Testimony of George A. Barrett.)

themselves. In the Co-operative Commonwealth there is no limit to the amount of private property one may own or accumulate just so long as it is secured through the individual's own social or productive labor. Great fortunes as we have them today which have been accumulated through profit on other men's labor, through gambling upon the Board of Trade or through manipulations of stocks and bonds—blood money, wrung from the labors of weaker or more unfortunate brothers, or coined from the heartaches and want and destitution of fellow men—cannot continue to exist under a co-operative system. Under co-operative principles, labor regains nobility; ambition and tireless application to one's duties, thrift and frugality, all again become exalted virtues.

Co-operation Supreme. Co-operation is the greatest and most important economic principle in the world today. True co-operation is religion for it is essentially the embodiment of the Golden Rule. "Whatsoever ye would that men should do unto you, do ye even also unto them" is the rock upon which is built the co-operative superstructure. It is government, and would put back into the hands of the individual the power to control. In this world of "poverty amidst plenty" it would provide for all men sufficient for comfort and happiness. It would destroy the monster of selfishness and greed; war and strife between nations would be abolished from the face of the earth. It would retain the principles

(Testimony of George A. Barrett.)

of private property but would eliminate desire or need to commit crime or cause suffering in order to amass wealth. It would release the genius of the race to solve the problems of the world—to discover new lessons of truth and to make life happier and more comfortable. Through perfect co-operative distribution of the commodities of the world, all men able and willing to work, may have everything desirable for comfort and happiness.

Those of us who are thus early in the Consumer Co-operative Movement are indeed fortunate. We are in the vanguard of a movement for humanity which is sweeping across the nation like a prairie fire before the wind. Ours is the opportunity to use our talent and best endeavor in a cause which is destined to mean more to humanity than anything that has come to pass since the beginning of the Christian era. The need of the hour demands strong, intelligent, active men and women. No army ever marched to war in a more sacred cause. [125]

(Testimony of George A. Barrett.)

Twenty Months Old
Patronage Dividends have been paid
amounting to $10,033.58.
Operations from April 7, 1933 to
November 30, 1934:

Sales:		
Gasoline	$269,257.24	
Oil and Grease	32,429.77	
Tires and Tubes	13,474.77	
Accessories	4,334.93	
Total Sales		$319,496.71
Cost of Goods Sold		250,345.02
Gross Trading Savings		$ 69,151.69
Add Other Revenue		6,062.69
Total Gross Savings		$ 75,214.38
Deduct Expenses		46,357.65
Net Savings to Members 20 Months Ending November 30, 1934		$ 28,856.73

Are You a Member?

Becoming a member of this Company you join hands and purpose with seventy-one million Co-operators distributed through forty-one nations of

(Testimony of George A. Barrett.)

the world. These millions demand that commodities and money be devoted to Use and not to Profit.

Stations

Caldwell Nampa Meridian Boise Kuna
Parma Wilder Huston Ustick

[Endorsed]: Petitioner's Exhibit No. 8. Admitted in evidence Nov. 7, 1938. [126]

"Petitioner's Exhibit No. 6 is a copy of the audit of Petitioner's operations covering a period from November 1, 1934, to October 31, 1935, by James Munro, a certified public accountant of Boise, Idaho.

(The said Exhibit 6 was offered for the purpose of disclosing what the books showed and to show the explanation of the auditor therein, who was not present to testify.)

"On page 2 in Exhibit A in Petitioner's Exhibit No. 6, under 'Liabilities,' referring to the item, 'Reserve for working capital,' the latter item I identify as the one heretofore referred to by me as showing the savings belonging to the members. During the period from December 31, 1933, to October 31, 1934, the same account was kept as a reserve showing savings of Petitioner's members. On the same page of Petitioner's said Exhibit No. 6 there is also a reserve for contingencies, obsolescence and exten-

(Testimony of George A. Barrett.)

sions. This is the only reserve set up by the Board of Directors by action of resolution. It is the only one that appears in the Minutes. [35]

(Cross-examination)

"Petitioner's business was the sale of gas, oil, tires and accessories, and such sales were also made to persons not members of Petitioner. Records were also kept of sales to non-members, but instead of having a folder for each non-member as we did for members, they were grouped together as non-member business. There was some record kept as to sales to each non-member. Non-members were not required to execute the contract, such as Petitioner's Exhibit No. 5. No savings were paid back to non-members. At various times Petitioner's Board of Directors passed a resolution releasing some of the savings to members. I think these resolutions took the form of a declaration of dividend. Of course, the terminology was rather loose. No money was actually paid to members other than pursuant to resolutions of the Board of Directors.

"Referring to Petitioner's Exhibit No. 6, the item, 'Reserve for working capital,' appearing in Exhibit A thereof, does not represent cash, excepting in part, it is merely a bookkeeping entry. No resolutions were adopted by the Board when entries were made in the reserve for working capital. Folders were kept containing sales tickets for each member, but no accounts were set up in the general

(Testimony of George A. Barrett.)

ledger showing any amounts contained in the account, 'Reserve for working capital,' as to each member. No accounts were set up on the general ledger for members of Petitioner showing any allocation of the [36] amount in the account, 'Reserve for working capital,' but Petitioner did have the total, the purchases of each member and for each year, and from a balance sheet the equity of each member was determined. In addition to a folder for each member, Petitioner also had work sheets which went into the general ledger or books of Petitioner. When I refer to savings being paid from time to time I meant savings were released pursuant to resolution of Board of Directors.

(Redirect examination)

"With reference to the item to which I refer above as 'Reserve for working capital,' this item was set up by the accountant as surplus reserve for working capital, and in some instances as reserve for future dividends. It was not a reserve at all. It was merely liability account, carried as a liability on our balance sheet—as a liability to our members. This item, 'Reserve for working capital,' evidences the savings due Petitioner's members. These savings were kept all in one account, the name being sometimes changed. At the end of a year the accountant takes the members' folders and totals each member's purchases and what is on the work sheets

(Testimony of George A. Barrett.)

that I mentioned above. Of course, any time, by taking the net profit, we could determine each member's equity in these savings; that is, as shown in the savings.

"As to non-members, we paid the tax on their savings and then such savings were distributed to members, the same as if they had been savings, and included in the account re- [37] ferred to by me as belonging to the members, thus included in the share that each member would get out of all the savings.

"A membership certificate would be issued to a member for one dollar. No interest or dividends were ever paid on any membership certificates.

"Now, referring again to the reserve and work sheets that we had, and heretofore mentioned, various members would at various times call upon us and ask how much of this account or savings in this reserve belonged to them or was due them. We would take in the work sheet and see their other purchases and from our ledger we would note the percentage. For instance, if a member traded $100.00 worth and had a saving of ten per cent, he would have $10.00 coming. That is the amount we would tell the member Petitioner owed him out of this so-called reserve. This was true during both years involved in this matter.

(Recross Examination)

"Probably twice a year during both years releases and additions were made to this reserve ac-

(Testimony of George A. Barrett.)

count. About once a year we would figure out the proportion which the business of non-members bore to the total business. When members at various times inquired as to how much in the reserve for working capital belonged to them at a particular time we could only answer the question up to the end of the fiscal year. [38] Anything beyond that would be an estimate. We wouldn't attempt to answer the members correctly, except up to the end of the fiscal year, where it had been determined. If someone wanted to know we might give him an estimate:

> " 'Our non-member business was so much last year and that much deducted and the earnings were so much last year; it is probable you will have something like this. * * *' "

"Q. I don't believe you stated whether or not a resolution was necessary to be adopted by the Board of Directors in order to pay moneys representing these savings to non-members. Is that a fact, Mr. Barrett?

"A. Actual paying of money, no actual resolution of the Board of Directors was necessary for proportioning the savings to the members. We did consider the releasing of funds usually required action of the Board of Directors.

"Q. Your testimony I believe was that no savings were paid to non-members?

"A. Yes."

(Testimony of George A. Barrett.)

(Redirect Examination)

"We consider that any member at any time could find out what proportion of these savings for the years involved in this matter belonged to him, and previous to the time that any assessment was made involved in this matter, the members were actually notified, each one individually, [39] of the proportion of savings that they had in Petitioner. These saxings were computed and figured as I have heretofore testified, based upon each year."

C. W. MONLUX,

a witness on behalf of Petitioner, testified as follows:

(Direct Examination)

"I am a member of the Board of Directors of Petitioner and chairman of such Board. As a part of my duties I go out among members and solicit memberships. I did this during the taxable period involved in this matter. I stated to them the mechanics of the operation of Petitioner, stating generally that our organization was based upon the principal of memberships taken out or sold with the idea that when members bought merchandise the savings they effected from patronizing their own organization would be released to them from time to time as occasion arose. We were very definite in explaining to the members that the savings could not belong to any one except the members, and would be paid to the members from time to time.

(Testimony of C. W. Monlux.)

(Cross Examination)

"No member received any payment representing savings without a prior resolution adopted by the Board of Directors and when such resolution was adopted the amounts [40] were paid through the resolution to the members. We always held back that part that we needed toward the capital but no other amounts were paid unless further resolutions were adopted by the Board of Directors.

(Redirect Examination)

"These releases, as I have called them, of sums to members, were simply the amounts which were not necessary in the use of the operation of Petitioner in connection with its business; we held back money enough so that when a member made a purchase we would have money to replace that purchase with other merchandise.

(Recross Examination)

"No interest was credited or allowed members in respect of any amounts standing in this reserve account to which I have been referring."

Dated this 22nd day of Nov., 1939.

WALTER GRIFFITHS
Residence: Caldwell, Idaho,
J. L. EBERLE
Residence: Boise, Idaho,
Attorneys for Petitioner.

[Endorsed]: Lodged Nov. 24, 1939. Filed Nov. 28, 1939. [41]

[Title of Board and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 128, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 6th day of Dec., 1939.

[Seal] B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

[Endorsed]: No. 9393. United States Circuit Court of Appeals for the Ninth Circuit. Co-operative Oil Association, Inc., an association, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed, December 14, 1939.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals,
for the Ninth Circuit

No. 9393

CO-OPERATIVE OIL ASSOCIATION, INC.,
an association,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS

Comes now Petitioner and appellant herein and makes this concise statement of points on which it intends to rely on the appeal herein, to wit:

Those certain designations of error contained in the Petition for Review and being paragraph IV, and subparagraphs numbered 1 to 9 inclusive, designated, "Assignments of Error," all of which are hereby adopted and incorporated as fully as if set forth at length herein, as the points and assignments of error of said Petitioner on appeal.

WALTER GRIFFITHS
Residence: Caldwell, Idaho
J. L. EBERLE
Residence: Boise, Idaho
Attorneys for Petitioner

Service acknowledged and copy received this..... day of January, 1940.

.....

Chief Counsel,
Bureau of Internal Revenue.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF RECORD TO BE PRINTED

Comes now Petitioner and appellant herein and designates the following portions of the record herein to be printed under Rule 19, to wit:

1. Pleadings:
   (a) Petition for redetermination.
   (b) Answer of Respondent.
   (c) Petitioner's reply.
2. Petition for review filed by Petitioner in the above cause.
3. Statement of the evidence, and only the following portions of Exhibits, to wit:

   (1) The following portions of Exhibit No. 1, being Petitioner's Articles of Incorporation, to wit:

      (a) Opening paragraph, preceding Article I.

      (b) Subparagraphs (a) and (l) of Article II.

      (c) Article V.

      (d) Article IX.

   (2) The following portion of Exhibit No. 2, being Petitioner's tax return; to wit:

      "The reserves for working capital of $10,040.51 is composed of $1,042.81 savings on non-member business and $8,997.70 savings on members business and will be distributed at some future date."

(3) The following portions of Exhibit No. 4, being Petitioner's By-Laws, to wit:

(a) Section 1 of Article III.

(b) Sections 4, 6, 8, and 11 of Article VIII.

(c) Section 1 of Article IX.

(d) Article X.

(e) Article XI.

(4) All of Exhibit No. 5—Marketing Agreement.

(5) All of Exhibits Nos. 7 and 8.

WALTER GRIFFITHS
Residence: Caldwell, Idaho
J. L. EBERLE
Residence: Boise, Idaho
Attorneys for Petitioner

[Title of Circuit Court of Appeals and Clause.]

AFFIDAVIT OF MAILING

State of Idaho,
County of Ada—ss.

Margaret W. Burt, being first duly sworn, upon oath deposes and says:

That she is a citizen of the United States and of the State of Idaho, over the age of 21 years, and is not a party to and is not interested in the above action;

That on the 6th day of January, 1940, she deposited in the United States Post Office at Boise, Idaho, in an envelope securely sealed, with postage prepaid thereon, one copy of statement of points, in the above entitled matter, together with one copy of designation of portions of record to be printed, in said matter, addressed and directed to:

J. P. Wenchel, Chief Counsel,
Bureau of Internal Revenue,
Washington, D. C.

MARGARET W. BURT

Subscribed and sworn to before me this 6th day of January, 1940.

[Seal] J. L. EBERLE
Notary Public for Idaho,
Residing at Boise, Idaho.

[Endorsed]: Filed Jan. 8, 1940. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

COUNTER-DESIGNATION OF ADDITIONAL PORTIONS OF RECORD TO BE PRINTED

Comes now the respondent in the above-entitled cause and designates the following additional parts of the record herein for printing under Rule 19, to wit:

1. Findings of fact, opinion and decision of the Board of Tax Appeals.

2. The following portion of Exhibit No. 1, being petitioner's Articles of Incorporation, to wit:

Subparagraph (j) of Article II.

SAMUEL O. CLARK, JR.,
Counsel for Respondent

[Endorsed]: Filed Jan. 20, 1940. Paul P. O'Brien, Clerk.

No. 9393

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CO-OPERATIVE OIL ASSOCIATION, INC.,
an Association,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF OF PETITIONER

Upon Appeal from the United States Board of Tax Appeals.

J. L. EBERLE,
Residence: Boise, Idaho,
Attorneys for Petitioner.

WALTER GRIFFITHS,
Residence: Caldwell, Idaho,

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BRIEF OF PETITIONER

Upon Appeal from the United States Board of Tax Appeals.

J. L. EBERLE,
Residence: Boise, Idaho,
Attorneys for Petitioner.

WALTER GRIFFITHS,
Residence: Caldwell, Idaho,

IN THE

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FOR THE NINTH CIRCUIT

CO-OPERATIVE OIL ASSOCIATION, INC.,
an Association,

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vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF OF PETITIONER

STATEMENT AS TO JURISDICTION

MAY IT PLEASE THE COURT:

Petitioner, in support of the jurisdiction of this Court to review the above entitled cause, respectfully represents:

Board of Tax Appeals Had Jurisdiction:

Title 26, Chapter 5, United States Code Annotated.

Jurisdiction of This Court:

This Court has jurisdiction on appeal under Subchapter B, Sections 640-1-2, Chapter 5, Title 26, United States Code Annotated.

The decision of the Board was entered July 10, 1939 (R. p. 31), and Petitioner's petition for review was filed October 5, 1939 (R. p. 37). The Board ordered and decided that there are deficiencies in Petitioner's income tax for the year from January 1, 1934, to October 31, 1934, and for the fiscal

year ending October 31, 1935, in the amounts of $1,065.25 and $1,696.33, respectively; and deficiencies in excess profits tax for the same years in the amounts of $387.36 and $618.39, respectively (R. p. 31).

STATEMENT

The sole question here involved is whether certain savings made by Petitioner's member-producers of agricultural products, in securing their supplies through Petitioner co-operative association during the taxable periods involved, were an obligation and liability of Petitioner to its member-producers and, hence, although not distributed during such taxable periods, were deductible and not taxable as income or excess profits under the United States Revenue Laws.

Petitioner is a non-profit co-operative marketing association organized and existing under and by virtue of the Co-operative Marketing Act of the State of Idaho, with its principal office and place of business at Caldwell, in the County of Canyon, State of Idaho.

In the taxable year, January 1, 1934 to October 31, 1934, Petitioner deducted the sum of $6,872.68 as savings belonging to member-producers and, although not distributed, as a liability from Petitioner to such members. Such deduction was disallowed by the Commissioner and deficiency income tax liability imposed in the sum of $1,065.25, and deficiency excess profits tax liability in the sum of $387.36, making a total of $1,452.61.

In the taxable year, October 31, 1934, to October 31,

1935, Petitioner deducted the sum of $11,147.30, as savings belonging to member-producers and, although not distributed, as a liability from Petitioner to such members. Such deduction was disallowed by the Commissioner and deficiency income tax liability imposed in the sum of $1,696.33, and deficiency excess profits tax liability in the sum of $618.39, making a total of $2,314.72.

Under the Co-operative Marketing Act, above mentioned, Petitioner was not organized to make a profit for itself, as such, but only for its members as producers. (Sec. 22-2002, Idaho Code Annotated.) A record was kept of the savings involved herein, the mechanics of keeping such record being a single account, which, together with certain work sheets and folders containing sales accounts of individual member-producers, showed the exact amount which Petitioner owed to each member-producer on account of such savings (R. p. 54). Although this account was called a "reserve" it was merely an account showing the liability of Petitioner to its member-producers for savings which belonged to them (R. p. 73). In selling memberships it was represented and understood that such savings would belong to members (R. p. 76). In sending reports to members, the funds in this account were shown as savings to members (R. p. 70). When any member inquired as to the amount that Petitioner owed him, this account, together with the work sheets and the member's folder, with his sales tickets, was used in computing the amount owed by Petitioner to such member and such member was advised that Petitioner was indebted to him in such amount (R. p. 74). The articles of incorpora-

tion, by-laws, and marketing agreement of Petitioner, specifically made such savings the property of member-producers, and the amount of such savings held by Petitioner an obligation and liability by it to members. The purpose of the officers and agents of Petitioner in setting up this account, as well as the representations and agreement between Petitioner and members, clearly manifested the intention of the parties that the funds evidenced by this account, however designated, belonged to members and was an obligation and liability to members.

The Board of Tax Appeals held that Petitioner was not entitled to deduct such savings and that the same were taxable. It is a review of such decision that Petitioner seeks herein.

SPECIFICATION OF ERRORS

The assignments of error set out in some detail a number of errors (R. p. 34-36). In brief they are:

1. The failure of the Board to allow as a deduction for the taxable year from January 1, 1934, to October 31, 1934, members' savings in the sum of $6,872.68, and for the taxable year October 31, 1934, to October 31, 1935, members' savings in the sum of $11,147.30.

2. The failure of the Board to hold and recognize the liability of Petitioner to its members for the savings above mentioned; and in the Board ignoring and closing its eyes to the manifest intent of the Co-operative Marketing Act of the State of Idaho, Petitioner's articles, by-laws, and marketing agreement, and the intent and understanding of Pe-

titioner and its members that the savings deducted as hereinbefore mentioned, belonged to Petitioner's member-producers, and that an obligation and liability therefor existed to them from Petitioner.

3. The holding of the Board that the savings above mentioned had been excluded by Petitioner through an act of its board of directors, and thus were not an obligation or liability of Petitioner to its member-producers, basing such holding upon a technical construction or fiction, manifestly contrary to the good faith, intention and understanding of Petitioner and its members, the record clearly showing no act on the part of Petitioner's board of directors excluding such savings, and the Act under which Petitioner was organized, its articles, by-laws and marketing agreement and the understanding between Petitioner and its member-producers being clear that the savings involved belonged to such members, and, even if undistributed, at all times were an obligation and liability on the part of Petitioner to its members.

4. In finding and holding that there are deficiencies in income taxes for the year from January 1, 1934, to October 31, 1934, and for the fiscal year ending October 31, 1935, in the amounts of $1,065.25 and $1,696.33, respectively, and in finding and holding that there are deficiencies in excess profits taxes for the same years in the amounts of $387.36 and $618.39, respectively.

SUMMARY OF THE ARGUMENT

1. Co-operatives organized under the Co-operative Marketing Act of the State of Idaho are deemed non-profit and

are not organized to make profits for themselves, as such, or for their members, as such, but only for their members as producers.

Section 22-2002, Idaho Code Annotated.

2. Where, under a co-operative's articles of incorporation, by-laws, or marketing agreement, savings belong to member-producers and a liability is thus created to such member-producers, the entry of such savings upon the co-operative's books, regardless of its designation, is no more than a record of such liability and neither the basis of accounting, whether on accrual or cash basis, nor the fact that no cash was paid to such producers in the taxable years involved, is material, and such savings are properly deductible.

Anamosa Farmers Creamery Co. v. Commr. of Internal Revenue, 13 B.T.A. 907.

Farmers' Union Co-Operative Association v. Commr. of Internal Revenue, 13 B.T.A. 969.

3. The good faith, intention and understanding of a co-operative and its member-producers should be accepted as to transactions as they were actually, in fact, and a technical construction or fiction should not be invoked to thwart such intention, good faith and understanding.

Bettendorf v. Commr. of Internal Revenue, 49 Fed. (2) 173, 176.

112 W. 59th St. Corporation v. Helvering, Commr., 68 Fed. (2) 397.

Randolph v. Commr. of Internal Revenue, 76 Fed. (2) 472.

4. Where a co-operative is organized under a marketing act expressly providing that no income or profits should accrue to anyone but member-producers, as such, and the articles of incorporation of such co-operative expressly provide that all savings should be paid to such producers and there is no act on the part of the board of directors of such co-operative excluding any portion of such earnings or placing them in any reserve such as contemplated by such articles, such savings, even though undistributed, remain the property of such producers and, while retained by the co-operative, are owing to such producers and are properly deductible as such liability from the tax returns of such co-operative.

AGRUMENT

The Board of Tax Appeals conceded that the savings involved were properly deductible and not taxable, even if undistributed, if a liability or obligation on the part of Petitioner to its members actually existed for the same; that such obligation or liability existed is clear, particularly from the provisions of Petitioner's articles, that the "net income * * * shall be distributed to the stockholding patrons * * * " (R. p. 24). The Board, however, premised its decision upon the fact that Petitioner's board of directors had excluded the savings involved as a "reserve," and had therefore removed the same as a liability to its members (R. p. 29).

Such premise is without foundation. Petitioner's board of directors never set aside such savings as a reserve or otherwise. No such action was ever taken by Petitioner's

board of directors and no reference to any such action can be found in the record.

The Board, in its decision, refers to Petitioner's position "that a liability to pay the entire yearly savings was created by the articles of incorporation, the by-laws, the membership agreement and that it was also recognized by the communications sent by the petitioner to its members" (R. p. 29). The Board proceeds to point out that the income shall be distributed, except the portion "which may be set aside as reserve funds by the board of directors." It then bases its decision upon the following statement:

> "In keeping with this provision the Board of Directors excluded a certain portion of the Petitioner's earnings and placed it in the account entitled: 'Reserve for Working Capital.'" (R. p. 29).

In other words, the Board's decision is based upon the proposition that although there was an obligation and liability on the part of the Petitioner to its members for the savings involved, the board of directors excluded these particular savings by setting them aside in a "reserve" such as contemplated by the provisions above mentioned. In addition to the fact that there is no finding to support such a decision, and no evidence of any such action on the part of Petitioner's board of directors, the record clearly shows that the agreement, the intention and the acts of the parties involved were manifestly that such savings were the property of the members, and there existed an obligation and liability for the same from Petitioner to its members.

The Board specifically based its decision on a "reserve

fund" within the meaning of the provisions of Article X of Petitioner's articles of incorporation, which fund might be "set aside as reserve funds by the Board of Directors." Not only is there no evidence that such a fund was ever set aside by action of the board of directors, but the evidence is clearly to the contrary. Mr. Barrett testified that there was a "reserve for contingencies, obsolescence and extensions." He then said:

> "This is the only reserve set up by the Board of Directors by action of resolution. It is the only one that appears in the Minutes." (R. p. 72).

Accordingly, there is no basis for the Board's decision, and the mere fact that the savings involved were not paid out or distributed during the taxable years above mentioned, or were used by Petitioner during the time that these funds were received and the time that they were actually paid to the producers, could not and did not alter their status or the obligation and liability for the same on the part of Petitioner to its member-producers.

Petitioner's General Manager testified that the monthly report showed the savings of the members, and that:

> "These accumulate through the year, month by month, and at the end of the year these savings are set up as a liability to the members by Petitioner. The savings, then, are shown each month in this statement, and, taken in connection with the folders showing the patronage of individual members, the savings of the members are carried as 'Group One Account.' These savings of Petitioner's members are kept in one account in connection with the folders of individual members." (R. p. 54).

Nowhere in the record was this statement, that these savings were set up as a liability by Petitioner to its members, contradicted.

In statements sent out to members, the funds in this so-called "reserve" are shown as savings (R. p. 70). In referring to this so-called "reserve," upon which the Board's decision is based, Petitioner's Manager testified:

> "I identify (it) as the one heretofore referred to by me as showing the savings belonging to the members."

Can there be any question that, regardless of denomination by Petitioner's bookkeepers, it was the intent of all parties that this account was simply the aggregate accrual of savings of members which, together with the folders above mentioned, showed the exact amount of net savings due each individual member? On the same page of the transcript Mr. Barrett further testified, referring to the same account:

> "During the period from December 1, 1933, to October 1, 1934, the same account was kept as a reserve, showing savings of Petitioner's members." (R. p. 71).

It was not denied that the terminology used was rather loose (R. p. 72), yet the Board fastens to this account the technical meaning necessary to bring it within the provisions of the articles above mentioned, although contrary to the intent and understanding of the parties involved.

In further explaining the account involved, Mr. Barrett testified that no resolutions were ever adopted by the board of directors with reference to this account (R. p. 72). He then said:

> "Folders were kept containing sales tickets for each member, but no accounts were set up in the general ledger showing any amounts contained in the account, 'Reserve for working capital,' as to each member. No accounts were set up on the general ledger for members of Petitioner showing any allocation of the amount in the account, 'Reserve for working capital,' but Petitioner did have the total, the purchases of each member and for each year, and from a balance sheet the equity of each member was determined. In addition to a folder for each member, Petitioner also had work sheets which went into the general ledger or books of Petitioner." (R. pp. 72-73)

The Board entirely ignored the uncontradicted testimony and record with reference to the actual purpose and intent of the so-called "reserve." The General Manager said:

> "It was not a reserve at all. It was merely liability account, carried as a liability on our balance sheet—as a liability to our members. This item, 'Reserve for working capital,' evidences the savings due Petitioner's members. These savings were kept all in one account, the name being sometimes changed." (R. p. 73)

Now, further showing the intent and understanding as between Petitioner and its members as to their agreement with reference to the funds involved, there is no contradiction of this testimony:

> "Now, referring again to the reserve and work sheets that we had, and heretofore mentioned, various members would at various times call upon us and ask how much of this account or savings in this reserve belonged to them or was due them. We would take in the work sheet and see their other purchases and from our ledger we would note the percentage. For instance, if a member traded $100.00 worth and had a saving of ten per cent, he would have $10.00 coming. That is the

> amount we would tell the member Petitioner owed him out of the so-called reserve. This was true during both years involved in this matter." (R. p. 74)

The Board absolutely ignored all testimony as to what this account was in fact, and that manifestly it was not such an account as contemplated by the word "reserve" in Petitioner's articles, but, the Board merely by reason of its designation as a reserve, changed the entire account, regardless of the understanding or agreement of the parties. The Chairman of Petitioner's Board of Directors testified as to the agreement and understanding between Petitioner and its members. He said that he would go out among the members and solicit memberships, particularly during the period involved in this matter. He testified:

> "I stated to them the mechanics of the operation of Petitioner, stating generally that our organization was based upon the principle of memberships taken out or sold with the idea that when members bought merchandise the savings they effected from patronizing their own organization would be released to them from time to time as occasion arose. We were very definite in explaining to the members that the savings could not belong to anyone except the members, and would be paid to the members from time to time. (R. p. 76)

In the case of Home Builders Shipping Association vs. Commissioner, 8 U. S. Board of Tax Appeals Reports 903, the articles provided that the profits should be divided annually among the stockholders. It was then pointed out: (p. 906)

> It was then orally agreed between the stockholder and the petitioner that the petitioner would later pay the stockholder an amount equal to the difference be-

> tween the price at which the petitioner resold the wheat, and the price originally paid the stockholder at the time of delivery plus the cost to the petitioner of reselling the wheat. Such so-called patronage dividends were actually paid to the stockholders on all 1916 and 1917 purchases but were not paid on the 1918 purchases for the reason that the petitioner did not have the money with which to make the payments."

It was then held: (p. 908)

> "We know of no reason why the amount of $4,137.70 should not be treated as a part of the cost of wheat purchased. It was intended by all of the parties that it should be so treated."

Can there be any question as to the intent and understanding of the parties involved as to the savings belonging to the members in this matter? Had the officers and bookkeepers of Petitioner co-operative been expert accountants and lawyers, there might even be some doubt as to the right of the Board to invoke a technical construction or fiction contrary to the obvious intent and understanding of Petitioner's officers and agents and of the agreement between Petitioner and its members; manifestly, however, in the case at bar, the Board was not justified in closing its eyes to the acts, agreements, and conduct of the parties, and refusing to give the meaning to the same, intended by the parties themselves.

> "The government will not resort to sharp practice, nor invoke technical construction or fiction, which will manifestly thwart the good-faith intention of its taxpayers, for the purpose of visiting a tax burden upon one who in fact did not, except by construction, derive any beneficial income from the transaction."

Bettendorf v. Commr. of Int. Rev., 49 Fed. (2d) 173 and 176.

Cited with approval in Randolph v. Commr. of Int. Rev., 76 Fed. (2d) 472.

"Tax laws are essentially practical in their purposes and application, and the federal income tax laws are no exception. * * * a cardinal purpose of the income tax laws is to tax the income to the person who has the right or beneficial interest therein, and not to throw the burden upon a mere collector or conduit through whom or which the income passes."

Central Life Society v. Commr., 51 Fed. (2d) 939, 941.

112 W. 59th Street Corporation v. Helvering, Commr., 68 Fed. (2d) 397.

After excluding the savings involved as being a "reserve," contemplated by Petitioner's articles, the Board proceeds to base its decision upon the holding in Farmer's Union Street Exchange v. Commr., 30 B.T.A. 1051. This holding, however, can be distinguished upon a number of grounds. Suffice it to say, however, the holding that the provision contained in the articles could not be "construed as creating in each year a definite liability to pay the entire saving of that year," is clearly justifiable inasmuch as Article VIII of the articles involved, specified that the by-laws (articles construed to have same force) should provide "for the distribution of the earnings of this corporation in part, or wholly on the basis of, or in proportion to the amount of property bought from or sold to members * * * or of labor performed, or other service rendered * * *" Surely it can-

not be contended that there is any similarity between these provisions and the definite provisions in the case at bar, providing that all of the savings be paid to members.

Moreover, the statutory provisions of Idaho definitely clarified the intent and purpose of the provision in Petitioner's articles, by-laws, and marketing agreement with reference to the payment of savings to members. Petitioner was organized under the Co-operative Marketing Act of the State of Idaho, Chapter 20, Title 22, Idaho Code Annotated. Prior to the enactment of this law, rather disastrous experience was had in connection with co-operatives in Southern Idaho. Speculative practices had generally defeated the purpose of cooperation. The purpose of the law was to prevent, if possible, repetition of such failures. It was for this reason that it was so clearly enunciated in the Act that the co-operative organized under it could not make a profit either for itself or for any of its members as such. The experience had been that the right of a co-operative to speculate and make profit either for itself or for its stockholders and members, as such, was conducive to unwholesome operations, with resulting loss to farmers and producers as such. The entire theory of the Act was, therefore, changed, and under the organic act, by virtue of which Petitioner obtained the right of existence, it cannot make any profit for itself or for any of its stockholders or members as such. The law specifically provides that any profit or saving must be for members, as producers, and not as members or stockholders of the co-operative.

Section 22-2002, Idaho Code Annotated, specifically states:

> "Associations organized hereunder should be deemed non-profit, inasmuch as they are not organized to make profits for themselves, as such, or for their members, as such, but only for their members as producers."

In line with this policy, so clearly enunciated and understood by every person interested in co-operatives in the State of Idaho, the articles and by-laws of Petitioner were drafted. No alternative was left to anyone as to the income; hence the articles provided that "the net income of the association * * * shall be distributed to the stockholding patrons of this association. * * *" Again, the by-laws provide that "the net income of this corporation * * * shall be distributed to the stockholding patrons of this association * * *."

The mere fact that such savings are not distributed and are set up in an account such as the one involved in this case, does not change the policy of the law nor the ownership of the funds which belong to the patrons, and not to the association or to its members or its stockholders as such, but only to members as producers of agricultural products. If all persons engaged in the co-operative movement were attorneys or auditors, perhaps more accurate phraseology would have been used. The mere fact that the savings in the so-called "reserve,"—sometimes called "group account," sometimes "working capital," or however they may have been designated—were not distributed or disbursed, would not change the obligation or liability of Petitioner to its mem-

bers. As heretofore pointed out, Petitioner's records were so kept that the interest of every participant in these savings could be ascertained at all times and when, later, the savings involved were distributed they were based upon such records and computed accordingly.

In the case of Anamosa Farmers Creamery Co. v. Commr. Int. Rev., 13 B.T.A. 907, the articles provided:

> "* * * all balance left after purchases, expenses and sinking funds have been provided for, shall be paid over to the patrons for butterfat."

The Board held that after paying operating expenses and dividends, the balance was credited to patrons, saying: (p. 908)

> "This procedure was in recognition of a liability created by the by-laws which are a contract between such a corporation and its patrons. In this situation neither the basis of accounting nor the fact that no cash was paid to the patrons in the taxable year is material."

In Farmers Union Co-operative Association v. Commr. Int. Rev., 13 B.T.A. 969, the articles again provided:

> "The remaining balance shall be divided pro rata among those customers who are Union Members on the basis of the value of business transacted with the corporation.

The Board held: (p. 970)

> "An entry on its books was no more than the record of a liability created by its by-laws and in this situation we are of the opinion that whether the books were kept on an accrual or cash basis is not material. The books did show the amounts distributable as patronage dividends and this was a liability at the close of the Petitioner's fiscal year."

In the case at bar it cannot be questioned but that the obligation and liability of Petitioner to its members for the savings involved is clearly fixed and established by the law under which Petitioner is organized, and by its articles, by-laws, and marketing agreement. The mechanics of bookkeeping, in having one ledger account which, together with work sheets and folders of each individual member, was sufficient to permit the determination of the exact amount of the liability of Petitioner to each and every patron, are not material, nor can the phraseology used with reference to the details of such account, or the reference to the savings as profits and transactions as sales and purchases, alter the nature of the co-operative involved, the relationship between it and its patrons as established by its articles, by-laws, and membership agreement, and the intent, understanding and agreement of Petitioner and its patrons. Petitioner, under the Co-operative Marketing Act of Idaho, can neither suffer loss nor enjoy profit. Petitioner becomes only an interested party, with an irrevocable power to manage and control all movements and acts necessary in its operation and in the marketing and supplying of products for distribution, and in prorating the costs, expenditures of the proceeds, and the distribution of the receipts to patrons. Not only can Petitioner neither suffer loss nor enjoy a profit as an association, but all receipts must be delivered back to members supplying the products, after deducting and prorating actual cost. No part of the receipts can be retained as association property or distributed to stockholders or members as such, but only to patrons.

The purpose of the Act, and the understanding of all concerned at all times, has been and now is that the association acts in the nature of an agency for its members, not in a proprietary capacity for itself.

The organic act under which Petitioner is organized, Petitioners articles, by-laws, and marketing agreement, cannot be construed otherwise than as creating a liability and obligation on the part of Petitioner to its patrons for the savings involved. When memberships are solicited, the representations are made, and it is clearly understood, that these savings become the property of patrons. The so-called "reserve" or account into which these savings are placed, was established and maintained during the years involved, with the intent and understanding on the part of the officers and agents of Petitioner that this account represented a liability of Petitioner to its patrons, and to each one of them in accordance with the amount as shown by this account, the work sheets and the individual folders, as hereinbefore mentioned. Petitioner's patrons also understood this to be a fact, not only from the representations made when memberships were obtained, but from the statements sent by Petitioner to such patrons. Under these circumstances the obligation and liability of Petitioner to patrons for the liability involved was clear and no distribution or other act by Petitioner was necessary.

CONCLUSION

WHEREFORE, We respectfully submit that the savings involved in this matter were properly deductible; that there

is no deficiency in either Petitioner's income or excess profits taxes; that the holding, finding and decision of the Board of Tax Appeals is erroneous and should be reversed, vacated, and set aside.

J. L. EBERLE,
Residence: Boise, Idaho,

WALTER GRIFFITHS,
Residence: Caldwell, Idaho,
Attorneys for Petitioner.

No. 9393

In the United States Circuit Court of Appeals for the Ninth Circuit

CO-OPERATIVE OIL ASSOCIATION, INC., AN ASSOCIATION,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
SEWALL KEY,
LEE A. JACKSON,
Special Assistants to the Attorney General.

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In the United States Circuit Court of Appeals for the Ninth Circuit

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CO-OPERATIVE OIL ASSOCIATION, INC., AN ASSOCIATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum opinion of the Board of Tax Appeals (R. 22–30) is unreported.

JURISDICTION

This case involves deficiencies in the income taxes of the taxpayer for the taxable year from January 1, 1934, to October 31, 1934, and for the fiscal year ending October 31, 1935, in the sums of $1,065.25 and $1,696.33, respectively, and also deficiencies in the taxpayer's excess profits taxes for the same years in the sums of $387.36 and $618.39, respectively. (R. 23.) The appeal is taken from a decision of the Board entered July 10, 1939 (R. 31), and is brought to this Court by a petition

for review filed October 5, 1939 (R. 32–37), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

QUESTION PRESENTED

Whether the taxpayer, a cooperative marketing association organized under the Cooperative Marketing Act of Idaho, is entitled to deductions for such "patronage dividends" as were not declared and paid during the taxable years.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved will be found in the Appendix, *infra,* pp. 14–18.

STATEMENT

The facts as found by the Board of Tax Appeals are as follows (R. 23–28):

The taxpayer is a corporation organized in 1933 as a nonprofit cooperative marketing association under the Cooperative Marketing Act of the State of Idaho, and has its principal office in Caldwell, Idaho. Its original name was Cooperative Union Oil Company of Boise Valley, State of Idaho, but on June 8, 1935, its name was changed to Cooperative Oil Association, Inc. Its charter granted to it broad general powers to purchase, sell, and deal in properties of every kind, but particularly petroleum products and automobile accessories and supplies. (R. 23–24.)

The taxpayer's authorized capital stock consisted of 5,000 shares of common stock of the par value of $1 each and 3,000 shares of redeemable nonvoting, nonparticipating 6 percent preferred stock of the par value of $5 each. Dividends on preferred stock are payable

before other stockholders may share in the earnings and are cumulative. No stock-holding patron may own more than one share of common stock nor cast more than one vote. The articles of incorporation contain the following provision (R. 24):

> The net income of this corporation, except such amounts as by law are required to be set aside for reserve funds, or which may be set aside as reserve funds, by the Board of Directors or by vote of stockholders shall be distributed to the stockholding patrons of this corporation who have signed the corporation's purchasing agreement on the basis of their patronage and as shall be provided by the Board of Directors.

The interest of each stockholding patron in the savings or earnings of the taxpayer is determined by the amount of purchases made by him. The management of the taxpayer's affairs is vested in a board of six directors. Membership in the taxpayer is limited to those engaged in the production of agriculture products and is conditioned upon the purchase of one share of common stock and the execution of a membership agreement. By that agreement members agree to purchase all gasoline and petroleum requirements from the taxpayer. If the member fails so to purchase for 60 days the taxpayer's board of directors may cancel his common stock and one share of his preferred stock and retain his share in the accumulated patronage dividends as liquidating damages. The agreement also provides as follows (R. 25):

> * * * before distribution of patronage dividends, it is the duty of the board of directors, and they shall retain and accumulate out of the

net earnings of the corporation, such amounts as in their judgment are necessary and proper to create a reserve or reserve funds necessary to provide working capital, depreciation and other reserves and the proper facilities for carrying on the business of the corporation.

Section 2, Article VIII, of the by-laws provides (R. 25):

> * * * Whenever all cumulative dividends on preferred stock for all previous years shall have become payable, and the accrued dividends for the current year shall have been declared and the corporation shall have paid such cumulative dividends for previous years, and such accrued dividends for the current year, or shall have set aside from its surplus or net profits a sum sufficient for payment thereof, the board of directors may declare other dividends or distribute earnings to the stockholding patrons of the corporation as hereinafter provided.

Section 1, Article IX of the by-laws is as follows (R. 26):

RESERVE FUNDS AND INVESTMENTS

> SECTION 1. Before distribution of patronage dividends herein provided for it shall be the duty of the board of directors, and they shall have the right to retain and accumulate out of the net earnings of the corporation such amounts as, in the judgment of said board of directors are necessary and proper to create a reserve or reserve funds necessary to provide working capital and the proper facilities for carrying on the business of the corporation.

Article X of the by-laws is as follows (R. 26–27):

NET EARNINGS

SECTION 1. The net income of this corporation except such amounts as by law are required to be set aside as reserve funds, or which may be set aside as reserve funds, or which may be set aside as reserve funds by the board of directors, or by the vote of the stockholders shall be distributed to the stockholding patrons of this corporation who have signed the corporation's purchasing agreement on the basis of their patronage and as shall be provided by the board of directors. Such patronage dividends shall be ascertained and distributed by order of the board of directors at least once during each fiscal year of the corporation, and may be so ascertained and paid by order of said board twice each fiscal year, at the discretion of the board.

When any purchase was made by a member the sales ticket covering the purchase was made out in triplicate, one copy going to the member and the other two being retained by the taxpayer. Of the latter copies, one was used for accounting purposes and the other was filed in a folder which was marked with the member's name and in which all sales tickets credited to him were kept. No accounts were set up on the general ledger of taxpayer relating to purchases made by members, but the aggregate of such transactions was entered on its books. Two reserve accounts were kept by the taxpayer, entitled "Reserve for Working Capital" and "Reserve for Contingency, Obsolescence and Extension." (R. 27.)

On May 1, 1934, the taxpayer sent to its members a circular letter containing the following statement (R. 27–28):

> *To All Members:*
>
> The attached draft or credit is only a part of your savings for the six months period ending January 31st, 1934. Your board of directors considers it desirable to retain a portion of the net profits of this period for working capital. As rapidly as our reserves accumulate these earnings will be released and disbursed to you as Patronage Refunds. In the meantime the money is being devoted to the excellent purpose of building your company and making possible larger dividends for the future.

No money was paid to members other than pursuant to resolutions of the board of directors. The portion of the current savings not released to members by authority of such resolutions was retained by the taxpayer, entered on its books as "Reserve for Working Capital" and carried on its balance sheet as a liability to its members. (R. 28.)

During the period from January 1 to November 1, 1934, the directors of the taxpayer declared dividends which were paid during that year aggregating $7,864.55. The total amount of savings for the year was $14,737.21, which the taxpayer took as a deduction on its income tax return for that period. During the fiscal year ending October 31, 1935, the directors declared and paid dividends aggregating $17,926.53. The total amount of savings for that year was $29,073.83, which the taxpayer also took as a deduction on its return for such year. (R. 28.)

Upon these findings, the Board approved the Commission's disallowance of the claimed deductions.

SUMMARY OF ARGUMENT

The taxpayer is a cooperative organized under the laws of Idaho and engaged in the business of purchasing and selling petroleum products and automobile accessories both to its members and to nonmembers. Taxpayer concedes that it is not exempt from taxation. It seeks to deduct in this case, however, the total amount of savings resulting from business with members during the taxable year. Deductions have been allowed for patronage dividends which were declared during the taxable year, but the claimed deductions for patronage dividends which were not declared and paid have been disallowed. Under well-settled principles, the taxpayer would not be entitled to the deductions in controversy as the right to these savings would not become fixed until an affirmative act of appropriation on the part of the board of directors of the corporation. The Board of Tax Appeals has carefully considered the taxpayer's articles of incorporation, bylaws, and membership agreement, and has reached the conclusion that a declaration of dividend by the board of directors was essential to the fixing of liability. That conclusion is correct and should be affirmed.

ARGUMENT

The taxpayer is not entitled to deductions for such "patronage dividends" as were not declared and paid during the taxable years

The taxpayer is a cooperative organized under the laws of the State of Idaho and engaged in the business

of purchasing and selling gas, oil, other petroleum products, and auto accessories. Its members are persons engaged in producing agricultural products, but the taxpayer does business with both members and nonmembers. It does not contend that it is an exempt corporation under Section 101 (12) of the Revenue Act of 1934, c. 277, 48 Stat. 680, *infra,* and clearly it is not. As provided in Article 101 (12)–1 of Treasury Regulations 86, *infra,* for a corporation to come within the exemption, it must treat nonmember patrons the same as members insofar as the distribution of patronage dividends is concerned. In the present case the savings on nonmember business were not paid to those nonmember patrons but were distributed to the members. (R. 72, 74, 75.) See *Farmers Union Co-op. Co.* v. *Commissioner,* 90 F. (2d) 488 (C. C. A. 8th); *Farmers Co-operative Co.* v. *United States,* 23 F. Supp. 123 (C. Cls.); *Farmers Union Co-operative S. Co.* v. *United States,* 23 F. Supp. 128, 25 F. Supp. 93 (C. Cls.). Cf. *Fruit Growers Supply Co.* v. *Commissioner,* 56 F. (2d) 90 (C. C. A. 9th). See also Mim. 3886, X–2 Cum. Bull. 164 (1931).

Although not contending that it is an exempt corporation, the taxpayer claims deductions for the total amounts of savings resulting from business with members during the taxable years in question. Such savings represent the excess of income over operating expenses attributable to the business of members.

The Commissioner allowed as deductions the amounts of savings to members for which patronage dividends were actually declared by the board of directors, but disallowed the balance of the claimed deduc-

tions. (R. 14–15, 18–19.) His action was approved by the Board. (R. 28–30.)

There is no express statutory provision permitting the deduction of so-called patronage dividends by corporations subject to taxation. The administrative practice, however, has been to permit cooperative associations, even though not exempt from taxation, to deduct from gross income the amounts returned to their patrons, whether members or nonmembers, upon the basis of the purchases or sales, or both, made by or for them. This is upon the theory that a cooperative association is organized for the purpose of furnishing its patrons goods at cost or for obtaining the highest market price for the produce furnished by them. In the case of purchases, instead of allowing a discount at the time of the purchase, the full price is collected and the discount is allowed by way of rebate. Any profits made on business with nonmembers which may be distributed to members in the guise of rebates are, of course, taxable to the association and the members. See I. T. 1499, I–2 Cum. Bull. 189 (1922); A. R. R. 6967, III–1 Cum. Bull. 287 (1924); *Trego County Cooperative Association* v. *Commissioner,* 6 B. T. A. 1275; *Home Builders Shipping Association* v. *Commissioner,* 8 B. T. A. 903; *Anamosa Farmers Creamery Co.* v. *Commissioner,* 13 B. T. A. 907; *Farmers Union Cooperative Association* v. *Commissioner,* 13 B. T. A. 969.

Where a corporation is formed and operated as was the taxpayer, clearly the proceeds from sales to its members as well as to nonmembers genuinely belong to it. It is true that those who might be entitled to patronage dividends have, in a sense, an interest in the money,

but, as it has been well said, the character of such interest is not greater than that of a stockholder in an ordinary corporation. *Farmers Union Co-op. Co.* v. *Commissioner,* 90 F. (2d) 488, 491 (C. C. A. 8th). With few exceptions, such interest ripens into an individual ownership or right of ownership only upon the actual declaration by the board of directors of a patronage dividend. *Fruit Growers Supply Co.* v. *Commissioner,* 56 F. (2d) 90 (C. C. A. 9th); *Farmers Union Co-op. Co.* v. *Commissioner,* 90 F. (2d) 488; *Farmers Union State Exchange* v. *Commissioner,* 30 B. T. A. 1051. Cf. *Penn Mutual Co.* v. *Lederer,* 252 U. S. 523.

In the present case, the taxpayer argues that the declaration of patronage dividends by its board of directors was not a condition precedent to the members' right to the savings on the purchases made by them, on the theory that the taxpayers' articles of incorporation, its by-laws and the marketing agreement definitely created and fixed the liability of the taxpayer to its members, and that the present case comes within the Board's decisions in *Anamosa Farmers Creamery Co.* v. *Commissioner,* 13 B. T. A. 907, and *Farmers Union Co-operative Association* v. *Commissioner,* 13 B. T. A. 969.

A similar contention was made below, and the Board correctly reached the conclusion that neither the articles of incorporation, the by-laws nor the marketing agreement created any fixed liability, but that some definite act of appropriation was essential. The articles of incorporation provide (R. 42–43) that "the Board of Directors may declare other dividends or distribute earnings to the stockholding patrons of the cor-

poration'' whenever all cumulative dividends on preferred stock for all previous years shall have become payable, and the accrued dividends for the current year shall have been declared, and the corporation shall have paid such cumulative dividends for previous years and such accrued dividends for the current year, or shall have set aside from its surplus or net profits a sum sufficient for payment thereof. The articles of incorporation further provide (R. 43) that the net income of the corporation shall be distributed to the stockholding patrons, ''except such amounts as by law are required to be set aside for reserve funds, or *which may be set aside as reserve funds, by the Board of Directors* or by vote of stockholders''. (Italics supplied.) This exception is repeated in the by-laws of the company in Section 11 of Article VIII (R. 47), in Section 1 of Article IX, and in Section 1 of Article X (R. 48). The exception is also contained in the membership agreement. (R. 52.) It is perfectly clear, we submit, from the wording of the several instruments, that no patronage dividend was to be credited or paid to the members of the taxpayer until there had been a declaration of dividend by the board of directors, and that the board of directors, before declaring any dividend, was to make provision for any necessary reserve fund. This construction of these instruments is supported by the testimony of the general manager of the taxpayer, and by the chairman of the board of directors of the taxpayer. The general manager testified (R. 72) that no money was actually paid to members other than pursuant to resolution of the board of directors, and the chairman of the board of directors testified (R. 77) that no mem-

ber received any payment representing savings without a prior resolution adopted by the board of directors, and that when such resolution was adopted, the amounts were paid through the resolution to the members, that the company always held back what was needed toward the capital, and that the releases to the members were simply the amounts which were not necessary in the operation of the taxpayer's business. The general manager testified (R. 72) that no resolutions were adopted by the board when entries were made in the reserve for working capital. This statement, in conjunction with the statement of the chairman of the board of directors that the sums released to the members were the amounts which were not necessary in the operation of taxpayer's business, amply warrant the conclusion of the Board (R. 28, 29) that in keeping with the provision in the articles of incorporation referred to above, the board of directors excluded a certain portion of the taxpayer's earnings and placed it in the account entitled "Reserve for Working Capital".

We respectfully submit that the Board's interpretation of the taxpayer's articles of incorporation, by-laws and membership agreement as requiring corporate action before patronage dividends accrue is a reasonable construction of those instruments, and that accordingly the present case may not be adequately distinguished from this Court's decision in *Fruit Growers Supply Co.* v. *Commissioner,* 56 F. (2d) 90.

The Board's decisions upon which the taxpayer relies are adequately distinguished by the Board in its opinion in the *Fruit Growers Supply Co.* case, 21 B. T. A. 315, 327.

CONCLUSION

The decision of the Board of Tax Appeals is correct and should be affirmed.

Respectfully submitted.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
LEE A. JACKSON,
Special Assistants to the Attorney General.

MARCH, 1940.

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 101. EXEMPTIONS FROM TAX ON CORPORATIONS.

The following organizations shall be exempt from taxation under this title—

* * * * *

(12) Farmers', fruit growers', or like associations organized and operated on a cooperative basis (a) for the purpose of marketing the products of members or other producers, and turning back to them the proceeds of sales, less the necessary marketing expenses, on the basis of either the quantity or the value of the products furnished by them, or (b) for the purpose of purchasing supplies and equipment for the use of members or other persons, and turning over such supplies and equipment to them at actual cost, plus necessary expenses. Exemption shall not be denied any such association because it has capital stock, if the dividend rate of such stock is fixed at not to exceed the legal rate of interest in the State of incorporation or 8 per centum per annum, whichever is greater, on the value of the consideration for which the stock was issued, and if substantially all such stock (other than nonvoting preferred stock, the owners of which are not entitled or permitted to participate, directly or indirectly, in the profits of the association, upon dissolution or otherwise, beyond the fixed dividends) is owned by producers who market their products or purchase their supplies and equipment through the association; nor shall exemption be denied any such association because there is accumulated and maintained by it a re-

serve required by State law or a reasonable reserve for any necessary purpose. Such an association may market the products of nonmembers in an amount the value of which does not exceed the value of the products marketed for members, and may purchase supplies and equipment for nonmembers in an amount the value of which does not exceed the value of the supplies and equipment purchased for members, provided the value of the purchases made for persons who are neither members nor producers does not exceed 15 per centum of the value of all its purchases. Business done for the United States or any of its agencies shall be disregarded in determining the right to exemption under this paragraph;

* * * * *

(U. S. C., Title 26, Sec. 103.)

Treasury Regulations 86 (promulgated under the Revenue Act of 1934):

ART. 101 (12)–1. *Farmers' cooperative marketing and purchasing associations.*—(*a*) Cooperative associations engaged in the marketing of farm products for farmers, fruit growers, live stock growers, dairymen, etc., and turning back to the producers the proceeds of the sales of their products, less the necessary operating expenses, on the basis of the products furnished by them, are exempt from income tax and shall not be required to file returns. For instance, cooperative dairy companies which are engaged in collecting milk and disposing of it or the products thereof and distributing the proceeds, less necessary operating expenses, among the producers upon the basis of the quantity of milk or of butter fat in the milk furnished by such producers, are exempt from the tax. If the proceeds of the business are distributed in any other way than on such a proportionate basis, the association does not meet the requirements of the Act and is not exempt. In other words, nonmember

patrons must be treated the same as members in so far as the distribution of patronage dividends is concerned, that is, if products are marketed for nonmember producers, the proceeds of the sale, less necessary operating expenses, must be returned to the patrons from the sale of whose goods such proceeds result, whether or not such patrons are members of the association. In order to show its cooperative nature and to establish compliance with the requirement of the Act that the proceeds of sales, less necessary expenses, be turned back to all producers on the basis of the products furnished by them, it is necessary for such an association to keep permanent records of the business done both with members and nonmembers. The statute does not require, however, that the association keep ledger accounts with each producer selling through the association. Any permanent records which show that the association was operating during the taxable year on a cooperative basis in the distribution of patronage dividends to all producers will suffice. While, under the Act patronage dividends must be paid to all producers on the same basis, this requirement is complied with if an association, instead of paying patronage dividends to nonmember producers in cash, keeps permanent records from which the proportionate shares of the patronage dividends due to nonmember producers can be determined, and such shares are made applicable toward the purchase price of a share of stock or of a membership in the association.

An association which has capital stock will not for such reason be denied exemption, (1) if the dividend rate of such stock is fixed at not to exceed the legal rate of interest in the State of incorporation or 8 percent per annum, whichever is greater, on the value of the consideration for which the stock was issued, and (2) if substantially all of such stock (with the exception noted below) is owned by producers who market their

products or purchase their supplies and equipment through the association. Any ownership of stock by others than such actual producers must be satisfactorily explained in the association's application for exemption. The association will be required to show that the ownership of its capital stock has been restricted as far as possible to such actual producers. If by statutory requirement all officers of an association must be shareholders, the ownership of a share of stock by a nonproducer to qualify him as an officer will not destroy the association's exemption. Likewise, if a shareholder for any reason ceases to be a producer and the association is unable, because of a constitutional restriction or prohibition or other reason beyond the control of the association, to purchase or retire the stock of such nonproducer, the fact that under such circumstances a small amount of the outstanding capital stock is owned by shareholders who are no longer producers will not destroy the exemption. The restriction placed on the ownership of capital stock of an exempt cooperative association shall not apply to nonvoting preferred stock, provided the owners of such stock are not entitled or permitted to participate, directly or indirectly, in the profits of the association, upon dissolution or otherwise, beyond the fixed dividends. The accumulation and maintenance of a reserve required by State statute, or the accumulation and maintenance of a reasonable reserve or surplus for any necessary purpose, such as to provide for the erection of buildings and facilities required in business or for the purchase and installment of machinery and equipment or to retire indebtedness incurred for such purposes, will not destroy the exemption. An association will not be denied exemption because it markets the products of nonmembers, provided the value of the products marketed for nonmembers does not exceed the value of the products marketed for members. Anyone who shares in the profits of a farmers'

cooperative marketing association, and is entitled to participate in the management of the association, must be regarded as a member of such association within the meaning of section 101 (12).

(*b*) Cooperative associations engaged in the purchasing of supplies and equipment for farmers, fruit growers, live-stock growers, dairymen, etc., and turning over such supplies and equipment to them at actual cost, plus the necessary operating expenses, are exempt. The term "supplies and equipment" as used in section 101 (12) includes groceries and all other goods and merchandise used by farmers in the operation and maintenance of a farm or farmer's household. The provisions of paragraph (*a*) relating to a reserve or surplus and to capital stock shall apply to associations coming under this paragraph. An association which purchases supplies and equipment for nonmembers will not for such reason be denied exemption, provided the value of the purchases for nonmembers does not exceed the value of the supplies and equipment purchased for members, and provided the value of the purchases made for nonmembers who are not producers does not exceed 15 percent of the value of all its purchases.

In order to be exempt under either (*a*) or (*b*) an association must establish that it has no net income for its own account other than that reflected in a reserve or surplus authorized in paragraph (*a*). An association engaged both in marketing farm products and in purchasing supplies and equipment is exempt if as to each of its functions it meets the requirements of the Act. Business done for the United States or any of its agencies shall be disregarded in determining the right to exemption under section 101 (12) and this article. An association to be entitled to exemption must not only be organized but actually operated in the manner and for the purposes specified in section 101 (12).

U. S. GOVERNMENT PRINTING OFFICE: 1940

No. 9393

IN THE

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FOR THE NINTH CIRCUIT

CO-OPERATIVE OIL ASSOCIATION, INC.,
an Association,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF OF PETITIONER

Upon Appeal from the United States Board of Tax Appeals.

J. L. EBERLE,
Residence: Boise, Idaho,
Attorneys for Petitioner.

WALTER GRIFFITHS,
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REPLY BRIEF OF PETITIONER

Replying to Respondent's brief, may it first be noted that Respondent now bases his entire case upon the proposition that the right of Petitioner's members to the savings involved "would not become fixed until an affirmative act of appropriation on the part of the Board of Directors" (see Summary of Argument, p. 7); and thus seeks to sustain the decision of the Board of Tax Appeals, which premised its decision upon an entirely different ground, namely: that although such right to such savings existed and there was an obligation and liability on the part of Petitioner to its members for such savings, the Board of Directors had excluded such particular savings by setting them aside in a reserve such as contemplated by the Articles of Incorporation.

As pointed out in our opening brief, manifestly no such reserve was ever set up by the Board of Directors. Article X of Petitioner's Articles of Incorporation provides for the

setting aside of certain reserve funds by the Board of Directors. The evidence showed that the only reserve fund thus ever set aside by the Board of Directors was "a reserve for contingencies, obsolescence and extensions" (Petitioner's brief, p. 13). Respondent in his brief does not even attempt to sustain the Board of Tax Appeal's statement that the savings involved herein were ever set aside as a reserve within such Articles, and although challenged so to do, counsel do not point out any reference in the record to the setting up of any such reserve by the Board of Directors.

Thus abandoning the basis of the Board's decision, counsel revert to a necessity for some affirmative act of appropriation on the part of the Board of Directors. As set forth at length in Petitioner's brief (pp. 20-23), the rule is whether there actually was an obligation or liability to the patrons for the savings involved, and if so, an affirmative or other act of appropriation or an entry in recognition of such liability or otherwise was immaterial.

The misconception of counsel is apparent from the statement on page 9 of Respondent's reply brief where it is said that the proceeds "from sales to its members belonged to the corporation." So, likewise, the statement at the bottom of said page 9 and top of page 10, to the effect that the interest of Petitioner's patrons in savings "is not greater than that of a stockholder in an ordinary corporation," and that the right to such savings "ripens into * * right of ownership only upon actual declaration by the Board of Directors," indicates clearly the fallacy of counsel's argument.

No attempt is made to answer Petitioner's argument under the statutory provisions pursuant to which Petitioner was organized. As set forth in our opening brief, page 20, Petitioner under the statute pursuant to which it was organized was not organized for a profit either for itself or for its members as such or as stockholders, but only as producers. The provisions of the statute, Articles and By-Laws are all framed upon this same theory, that the savings belonged neither to the association nor its stockholders nor members, but solely to the producers; yet counsel have the temerity to ignore the statutory provisions, the Articles of Incorporation, By-Laws, and marketing agreements, and blandly state that the interest of the patron in a cooperative association in the State of Idaho "is not greater than that of a stockholder in an ordinary corporation" (Brief, p. 10).

Counsel then proceed to close their eyes to the intention of the parties involved. The mere fact that the savings were being used pending distribution does not constitute such funds as a "reserve" as contemplated by the Articles. The authority in the Board of Directors to set up a reserve such as mentioned by the Board of Tax Appeals was exercised as shown by the record in setting up a reserve for "contingencies, obsolescence and extensions." But no other reserve was set up, and the savings involved were not so set aside in such a reserve.

No corporate action was necessary to set up a liability for the savings, whether distributed or undistributed, to Petitioner's members. The statements contained in the Articles, By-Laws and marketing agreements are unequivocal in

establishing the right of members to these savings. Stripped of all non-essentials, they read: "The net income of this corporation * * * shall be distributed to the stock-holding patrons * * * who have signed the corporation's purchasing agreement on the basis of their patronage * * *." There is no discretion in Petitioner's Board of Directors. The liability and the duty is fixed. In other words: under the theory and the statutory provisions of the Cooperative Marketing Act of the State of Idaho, and the Articles and By-Laws made pursuant thereto, no action on the part of the Board of Directors is necessary to make such savings subject to distribution to members, or necessary to create a legal right in the members to demand and receive the distribution of such savings. The right to set up the reserve for contingencies, obsolescence and extensions above mentioned is merely a limitation on this legal right of members and the obligation to them for such savings.

Counsel's error is quite apparent from the principal case upon which they rely in the closing paragraph of their brief (p. 12), Fruit Growers Supply Co. case, 21BTA 315, 327. It illustrates Respondent's misconception that the Cooperative Marketing Act of Idaho and the Articles pursuant thereto are in no sense any different from those involved in the cases cited in their brief. In the Fruit Growers Supply Company case it was said that the by-laws provide it shall be the duty of the directors to "declare dividends out of surplus profits when such profits shall, in the opinion of the directors, warrant the same, subject to the provisions" of another

section wherein it is provided that the directors are authorized to prescribe "the time and manner of readjustment with or refund to its patrons."

Manifestly these provisions are diametrically opposite to those contained in the case at bar. The right of and liability to members in the cited case depended upon the discretion of the Board of Directors. The purpose of the Cooperative Marketing Act of the State of Idaho was to prevent such a situation, and the entire theory and all the provisions of the Act expressly set forth that all of such savings belong to the members as patrons and shall be distributed to them as hereinbefore mentioned. All payments made to members were made by reason of the statute, Articles, By-Laws and membership agreements. No resolutions of the Board of Directors and no act on their part whatsoever was necessary to authorize such payment. Any action that they may have taken with respect to authorizing such payments was mere surplusage. The funds belonged to the members, the payment of such funds was a legal duty imposed upon the officers of the association, and any act, either in setting up such funds as a liability or in authorizing payment, merely reflected such liability.

Accordingly, as stated in our opening brief, any act of appropriation or otherwise with respect to the payment of these savings to members or setting them up as a liability to such members merely reflected the absolute liability and duty fixed by law, Articles and By-Laws. The entire record shows the intent and understanding of Petitioner and its members at

all times was simply to carry out this conception and the liability and duty thus imposed.

As pointed out in our opening brief, regardless of what the account was named or designated, the savings evidenced thereby were "a liability to the members of Petitioner" (Brief, p. 13). Petitioner's manager testified that this account, no matter how designated or referred to, showed "the savings belonging to the members" (Brief, p. 14). That the members understood these savings were due them and a liability of Petitioner to them, is also apparent from the record, because as these members inquired as to the amount due them, Petitioner's officers would compute the same from the account involved and advise them that the association owed them a certain sum (Brief, pp. 15, 16). So likewise, when memberships were obtained the same statement was made to them; and the understanding at all times of the parties, both when memberships were obtained, when supplies were purchased or furnished, and when inquiry was made as to the amount due from Petitioner to its members, was that there was a definite and fixed liability of Petitioner to such members for the savings involved herein.

However, Respondent makes no effort to answer the argument with reference to such intent and understanding as set forth in our opening brief. He simply ignores the intention and understanding in good faith of these parties and relies, by reiteration, upon the word "reserve" in its technical sense. The testimony throughout the record shows that in these farmer cooperative organizations the officers and patrons are not lawyers or expert accountants, and loose language is

often employed in referring to transactions. Manifestly, however, regardless of nomenclature, the intent of the parties is paramount, and the account in question was kept in such a way that the liability of each patron could be determined at any time, and was so determined.

Merely because the word "reserve" was at times used, we find counsel assuming that the word was used as contemplated by its technical meaning and set up by the Board of Directors as permitted by the Articles, although the record clearly shows that such a reserve never was set up by the Board of Directors, and the testimony is uncontradicted that the savings involved were an actual liability and obligation to the members, one of the officers in particular testifying: "It was not a reserve at all. It was merely liability account, carried as a liability on our balance sheet—as a liability to our members." (R., p. 73)

This position of counsel and the attitude of Respondent is contrary to the rule that the Government will not be permitted to resort to sharp practice nor to invoke technical constructions or fiction which will manifestly thwart the good-faith intention of its taxpayers for the purpose of casting a tax burden upon them. (Petitioner's Brief, pp. 17, 18).

Accordingly, it is manifest that counsel have misconceived the entire purpose and the provisions of the Cooperative Marketing Act of the State of Idaho; that the statement of counsel that an affirmative act of the Board of Directors is necessary to constitute a liability of Petitioner to its members (Brief, p. 7), is clearly erroneous, there being no discre-

tion in the Board under such Cooperative Marketing Act and the Articles pursuant thereto, the liability and duty being mandatory and fixed; that the statement of counsel that the proceeds from Petitioner's sales to its members belong to Petitioner (Brief, p. 9) is contrary to the purpose and statutory provisions of the Cooperative Marketing Act; that under such Act such savings can not belong to a member or stockholder as such, and counsel ignores the statutory provisions in their statement that such interest "is not greater than that of a stockholder" (Brief, p. 10); that under said Act and Articles the interest of members in savings becomes absolute when such savings are made, and counsel misconceives the entire purpose of the Cooperative Marketing Act of Idaho when they state that "such interest ripens into an individual ownership or right of ownership only upon declaration by the Board of Directors," no discretion in such board being permitted under the Idaho law and Petitioner's Articles; that Respondent by closing his eyes and ignoring the testimony throughout the record showing the intent and understanding of the parties can not, by invoking technical constructions or fictions, thwart such intention and understanding and thus cast a tax burden upon Petitioner; that Petitioner under the Cooperative Marketing Act of Idaho can neither suffer loss nor enjoy profit, the savings belong to members as earned and the right to set up certain reserves is only a limitation on Petitioner's liability to members; that the savings in question were not such a reserve, as shown by the record.

The entire record shows that all parties construed the purpose and provisions of the statute, Articles, By-Laws and marketing agreement as creating a liability and obligation on the part of Petitioner to its patrons for the savings involved. When memberships were solicited such representations were made and clearly understood. Both officers and patrons understood that this account represented a liability of Petitioner to its patrons, and to each of them in accordance with the amount as shown by this account, the work sheets, and individual folders. Under these circumstances the liability involved of Petitioner to its patrons was clear, and no distribution or other act by Petitioner was necessary.

We respectfully submit, therefore, that the savings involved in this matter were properly deductible and that there is no deficiency in either Petitioner's income or excess profits taxes, and that the holding, finding and decision of the Board of Tax Appeals is erroneous and should be reversed, vacated and set aside.

J. L. EBERLE,
Residence: Boise, Idaho,

WALTER GRIFFITHS,
Residence, Caldwell, Idaho,
Attorneys for Petitioner.

No. 9393

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CO-OPERATIVE OIL ASSOCIATION, INC.,
an Association,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REHEARING

Upon Appeal from the United States Board of Tax Appeals.

ARTHUR A. GOLDSMITH,
Residence: Portland, Oregon,

J. L. EBERLE,
Residence: Boise, Idaho,

WALTER GRIFFITHS,
Residence: Caldwell, Idaho,
Attorneys for Petitioner.

No. 9393

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CO-OPERATIVE OIL ASSOCIATION, INC.,
an Association,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REHEARING

To the Ninth Circuit Court of Appeals and the Honorable Judges thereof:—

Comes now the Petitioner, Co-operative Oil Association, Inc., in the above entitled cause, and presents this, its Petition for a Rehearing of the above entitled cause, and in support thereof respectfully shows:—

I.

This Court erred in assuming that the Petitioner must show some statutory provision authorizing the deduction of its savings or earnings. It is unnecessary for the Petitioner to show that there was any such statutory provision or that it is the object of legislative grace by pointing to any statute, as Congress can only tax income as defined in the Sixteenth Amendment to the Constitution of the United States. The Petitioner states that as a non-profit cooperative association, its savings or earnings, so-called "patronage dividends", were mere over-charges that must be refunded to its patrons. They represent the difference between the actual cost and the prices charged, and the balance is not a profit, but a liability to the patrons.

II.

This Court erred in holding that the Board of Tax Appeals found that the earnings not paid out in dividends was not a liability to members. The finding of the Board of Tax Appeals was as follows: "No money was paid to members other than pursuant to resolution of the Board of Directors. The portion of the current savings not released to members by authority of such resolutions was retained by the Petitioner, entered on its books as, 'Reserve for Working Capital', *and carried on its balance sheet as a liability to its members.*" (Italics ours.) Thus the finding of the Board of Tax Appeals expressly recognizes that the part of the savings retained was actu-

ally treated as a liability to its members. (Tr. of Record, p. 28.) It is thus clear that the amounts in question were not taxable income under the Sixteenth Amendment to the Constitution of the United States.

III.

This Court and the Board of Tax Appeals erred in not holding that under the Cooperative Marketing Act of the State of Idaho, the Petitioner's Articles of Incorporation, By-Laws and Marketing Agreement, the savings or earnings, *without any corporate action or act of appropriation* accrue immediately as a liability to the members. By proper corporate action of the Board of Directors or of the Stockholders, part of such earnings or savings might have been withheld as reserve funds, but the record shows that no such action was taken by either the Board or the Stockholders. Under the facts in this case no act of appropriation was necessary to vest the ownership of the savings in the members. On the other hand, an act of appropriation by the Board of Directors or Stockholders would be necessary to withhold such earnings for the reserve fund, and no such action was taken. *Consequently no income accrued to the Petitioner, although the savings did accrue as income to the members of Petitioner in proportion to their patronage.*

IV.

This Court erred in not holding that this case was governed by the case of *Uniform Printing & Supply Co.*

vs. Commissioner, 88 Fed. (2d) 75; *Valley Waste Disposal Co.,* 38 B. T. A. 452, and similar cases.

WHEREFORE, Upon the foregoing grounds, it is respectfully urged that this Petition for a rehearing be granted and that the judgment of the Board of Tax Appeals be upon further consideration reversed.

Respectfully submitted,

ARTHUR A. GOLDSMITH,
Residence: Portland, Oregon,

J. L. EBERLE,
Residence: Boise, Idaho,

WALTER GRIFFITHS,
Residence: Caldwell, Idaho,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL

I, Arthur A. Goldsmith, of counsel for the above named Co-operative Oil Association, Inc., do hereby certify that the foregoing Petition for a Rehearing of this cause is presented in good faith and not for delay.

ARTHUR A. GOLDSMITH,
Counsel for Petitioner.

No. 9397

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED CIGAR WHELAN STORES CORPORATION, a corporation, and EDGAR DEHNE,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States for the District of Montana.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 9397

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED CIGAR WHELAN STORES CORPORATION, a corporation, and EDGAR DEHNE,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States for the District of Montana.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

Messrs. CORETTE & CORETTE,
Mr. ROBERT D. CORETTE, and
Mr. WM. A. DAVENPORT,
619-621 Hennessy Building, Butte, Montana,

JESSE H. STEINHART
111 Sutter St., San Francisco, Calif.,
Attorneys for Appellants and Defendants.

Mr. JOHN B. TANSIL,
United States District Attorney,

Mr. R. LEWIS BROWN,
Assistant U. S. District Attorney,

Mr. W. D. MURRAY,
Assistant U. S. District Attorney, and

Mr. ROY F. ALLAN,
Assistant U. S. District Attorney,
All of Butte, Montana,
Attorneys for Appellee and Plaintiff. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States in and for the District of Montana

No. 3443

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED CIGAR WHELAN STORES CORPORATION, a corporation, and EDGAR DEHNE,

Defendants.

Be It Remembered that on June 17, 1939, an Indictment was presented and filed herein, being in the words and figures following, to-wit: [2]

In the District Court of the United States in and for the District of Montana, Butte Division

No. 3443

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED CIGAR WHELAN STORES CORPORATION, a Corporation, and EDGAR DEHNE,

Defendants.

INDICTMENT

In the June, 1939 term of the above-entitled Court, held at the city of Helena, in the state and district

of Montana, the grand jurors of the United States, duly impaneled, sworn and charged to inquire, within and for the district of Montana, and true presentment make of all public offenses against the laws of the United States, within said State and District, upon their oaths and affirmations *to* find, charge and present:

COUNT ONE

T. D. 4750—Carrying on Business of Retail Liquor Dealer) (26-1397(a)(1))

That beginning on or about the 9th day of March, 1939, and continuing until on or about the 15th day of April, 1939, at 34 North Main Street, in the city of Butte, In the county of Silver Bow, in the State and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, [3] other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully, knowingly and feloniously carry on the business of a retail liquor dealer and willfully fail to pay the special tax imposed by law on such dealers, in that said defendants, and each of them, then and there, in violation of a regulation issued under Title III of the National Prohibition Act, as amended, pertaining to and forbidding the sale of articles in the manufacture of which

denatured alcohol is used, under circumstances from which said defendants might reasonably deduce that it was the intention of the purchaser to procure the same for beverage purposes, did, on or about the 9th day of March, 1939, at the place aforesaid, sell one pint, more or less, of such an article, to-wit: Weko, to a certain person, to-wit: to Julius N. Johnson, and on or about the 9th day of March, 1939, at the place aforesaid, did sell one pint, more or less, of such an article, to-wit: Wecol, to a certain person, to-wit: to Julius N. Johnson; and on or about the 9th day of March, 1939, at the place aforesaid, did sell one pint, more or less of such article, to-wit: Wecol, to a certain person, to-wit: to Julius N. Johnson; and on or about the 9th day of March, 1939, at the place aforesaid, did sell one pint, more or less, of such an article, to-wit: Wecol, to a certain person, to-wit: to Julius N. Johnson; and on or about the 10th day of March, 1939, at the place aforesaid, did sell one pint, more or less, of such an article, to-wit: Wecol, to a certain person, to-wit: to Julius N. Johnson; and on or about the 10th day of March, 1939, at the place aforesaid, did sell one pint, more or less, of such an article, to-wit: Weko, to a certain person, to-wit: to Julius N. Johnson; and on or about the 10th day of March, 1939, at the place aforesaid, did sell one pint, more or less of such an article, to-wit: Weko, to a certain person, to-wit: to Julius N. Johnson; and on or about the 10th [4] day of March, 1939, at the

place aforesaid, did sell one pint, more or less, of such an article, to-wit: Weko, to a certain person, to-wit: to Julius N. Johnson; and on or about the 15th day of April, 1939, at the place aforesaid, did sell one pint, more or less, of such an article, to-wit: Wecol, to a certain person, to-wit: to Julius N. Johnson; and on or about the 15th day of April, 1939, at the place aforesaid, did sell four pints, more or less, of such an article, to-wit: Wecol, to a certain person, to-wit: to Julius N. Johnson, under circumstances from which they, the said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, and said defendants, and each of them, did willfully fail to pay a special tax as a retail dealer in liquors; contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the United States of America.

[5]

COUNT TWO

(T. D.—4750—Sale for Beverage Purposes)
(27-85)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present;

That on or about the 9th day of March, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of

Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated, is to the grand jurors aforesaid unknown, did, then and there, willfuly, wrongfully, unlawfuly and knowingly sell to a certain person, to-wit: to one Julius N. Johnson, one pint, more or less, of an article, to-wit: Weko, in the Manufacture of which denatured alcohol was used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation pertaining thereto (Article 146-A, Regulation No. 3, as amended); contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the United States of America. [6]

COUNT THREE

(T. D.—4750—Sale for Beverage Purposes)
(27-85)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present;

That on or about the 9th day of March, 1939, at 34 North Main Street, in the city of Butte, in the

county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully and knowingly sell to a certain person, to-wit: to one Julius N. Johnson, one pint, more or less, of an article, to-wit: Wecol, in the manufacture of which denatured alcohol was used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation pertaining thereto (Article 146-A, Regulation No. 3, as amended); contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the United States of America. [7]

COUNT FOUR

(T. D. 4750—Sale for Beverage Purposes)
(27-85)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 9th day of March, 1939, at 34 North Main Street, in the city of Butte, in

the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully and knowingly sell to a certain person, to-wit: to one Julius N. Johnson, one pint, more or less, of an article, to-wit: Wecol, in the manufacture of which denatured alcohol was used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation pertaining thereto (Article 146-A, Regulation No. 3, as amended); contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the United States of America. [8]

COUNT FIVE

(T. D. 4750—Sale for Beverage Purposes)
(27-85)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 9th day of March, 1939, at 34 North Main Street, in the city of Butte, in the

county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Store Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully and knowingly sell to a certain person, to-wit: to one Julius N. Johnson, one pint, more or less, of an article, to-wit: Wecol, in the manufacture of which denatured alcohol was used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation pertaining thereto (Article 146-A, Regulation No. 3, as amended); contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the United States of America. [9]

COUNT SIX

(T. D. 4750—Sale for Beverage Purposes)
(27-85)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 10th day of March, 1939, at 34 North Main Street, in the city of Butte, in the

county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully and knowingly sell to a certain person, to-wit: to one Julius N. Johnson, one pint, more or less, of an article, to-wit: Wecol, in the manufacture of which denatured alcohol was used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation pertaining thereto (Article 146-A, Regulation No. 3, as amended); contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the United States of America. [10]

COUNT SEVEN

(T. D. 4750—Sale for Beverage Purposes)
(27-85)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 10th day of March, 1939, at 34 North Main Street, in the city of Butte, in the

county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully and knowingly sell to a certain person, to-wit: to one Julius N. Johnson, one pint, more or less, of an article, to-wit: Weko, in the manufacture of which denatured alcohol was used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation pertaining thereto (Article 146-A, Regulation No. 3, as amended); contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the United States of America. [11]

COUNT EIGHT

(T. D. 4750—Sale for Beverage Purposes)
(27-85)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 10th day of March, 1939, at

34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully and knowingly sell to a certain person, to-wit: to one Julius N. Johnson, one pint, more or less, of an article, to-wit: Weko, in the manufacture of which denatured alcohol was used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation pertaining thereto (Article 146-A, Regulation No. 3, as amended); contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the United States of America [12]

COUNT NINE

(T. D. 4750—Sale for Beverage Purposes)
(27-85)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 10th day of March, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully and knowingly sell to a certain person, to-wit: to one Julius N. Johnson, one pint, more or less, of an article, to-wit: Weko, in the manufacture of which denatured alcohol was used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation pertaining thereto (Article 146-A, Regulation No. 3, as amended); contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the United States of America. [13]

COUNT TEN

(T. D. 4750—Sale for Beverage Purposes)
(27-85)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 15th day of April, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully and knowingly sell to a certain person, to-wit: to one Julius N. Johnson, one pint, more or less, of an article, to-wit: Wecol, in the manufacture of which denatured alcohol was used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation pertaining thereto (Article 146-A, Regulation No. 3, as amended); contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the United States of America. [14]

COUNT ELEVEN

(T. D. 4750—Sale for Beverage Purposes)
(27-85)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 15th day of April, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully and knowingly sell to a certain person, to-wit: to one Julius N. Johnson, four pints, more or less, of an article, to-wit: Wecol, in the manufacture of which denatured alcohol was used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation pertaining thereto (Article 146-A, Regulation No. 3, as amended); contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the United States of America. [15]

COUNT TWELVE

(T. D. 4750—Sale in Unstamped Containers)
(26-1152a)
(26-1152g)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 9th day of March, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully, knowingly and feloniously sell Weko, an article in the manufacture of which denatured alcohol had been used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation issued under Title III of the National Prohibition Act, pertaining to and forbidding the sale of such article under such circumstances, in immediate containers on which there was affixed no stamp denoting the quantity of the article contained therein and evidencing payment of all Internal Revenue taxes imposed on such article; contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the United States of America. [16]

COUNT THIRTEEN

(T. D. 4750—Sale in Unstamped Containers)
(26-1152a)
(26-1152g)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 9th day of March, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully, knowingly and feloniously sell Wecol, an article in the manufacture of which denatured alcohol had been used, under circumstances from which said defendants and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation issued under Title III of the National Prohibition Act, pertaining to and forbidding the sale of such article under such circumstances, in immediate containers on which there was affixed no stamp denoting the quantity of the

article contained therein and evidencing payment of all Internal Revenue taxes imposed on such article; contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the United States of America.

[17]

COUNT FOURTEEN

(T. D. 4750—Sale in Unstamped Containers)
(26-1152a)
(26-1152g)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 9th day of March, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there. willfully, wrongfully, unlawfully, knowingly and feloniously sell Wecol, an article in the manufacture of which denatured alcohol had been used, under circumstances from which said defendants and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for

use for beverage purposes, in violation of a regulation issued under Title III of the National Prohibition Act, pertaining to and forbidding the sale of such article under such circumstances, in immediate containers on which there was affixed no stamp denoting the quantity of the article contained therein and evidencing payment of all Internal Revenue taxes imposed on such article; contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the United States of America. [18]

COUNT FIFTEEN

(T. D. 4750—Sale in Unstamped Containers)
(26-1152a)
(26-1152g)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 9th day of March, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully, know-

ingly and feloniously sell Wecol, an article in the manufacture of which denatured alcohol had been used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation issued under Title III of the National Prohibition Act, pertaining to and forbidding the sale of such article under such circumstances, in immediate containers on which there was affixed no stamp denoting the quantity of the article contained therein and evidencing payment of all Internal Revenue taxes imposed on such article; contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the United States of America.

[19]

COUNT SIXTEEN

(T. D. 4750—Sale in Unstamped Containers)
(26-1152a)
(26-1152g)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 10th day of March, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan

Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully, knowingly and feloniously sell Wecol, an article in the manufacture of which denatured alcohol had been used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation issued under Title III of the National Prohibition Act, pertaining to and forbidding the sale of such article under such circumstances, in immediate containers on which there was affixed no stamp denoting the quantity of the article contained therein and evidencing payment of all Internal Revenue taxes imposed on such article; contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the United States of America.

[20]

COUNT SEVENTEEN

(T. D. 4750—Sale in Unstamped Containers)

(26-1152a)

(26-1152g)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 10th day of March, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully, knowingly and feloniously sell Weko, an article in the manufacture of which denatured alcohol had been used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation issued under Title III of the National Prohibition Act, pertaining to and forbidding the sale of such article under such circumstances, in immediate containers on which there was affixed no stamp denoting the quantity of the article contained therein and evidencing payment of all Internal Revenue taxes imposed on such article; contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the United States of America. [21]

COUNT EIGHTEEN

(T. D. 4750—Sale in Unstamped Containers)
(26-1152a)
(26-1152g)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 10th day of March, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully, knowingly and feloniously sell Weko, an article in the manufacture of which denatured alcohol had been used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation issued under Title III of the National Prohibition Act, pertaining to and forbidding the sale of such article under such circumstances, in immediate containers on which there was affixed no stamp denoting the quantity of the article contained therein

and evidencing payment of all Internal Revenue taxes imposed on such article; contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the United States of America. [22]

COUNT NINETEEN

(T. D. 4750—Sale in Unstamped Containers)
(26-1152a)
(26-1152g)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 10th day of March, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully, knowingly and feloniously sell Weko, an article in the manufacture of which denatured alcohol had been used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for

beverage purposes, in violation of a regulation issued under Title III of the National Prohibition Act, pertaining to and forbidding the sale of such article under such circumstances, in immediate containers on which there was affixed no stamp denoting the quantity of the article contained therein and evidencing payment of all Internal Revenue taxes imposed on such article; contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the United States of America. [23]

COUNT TWENTY

(T. D. 4750—Sale in Unstamped Containers)
(26-1152a)
(26-1152g)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 15th day of April, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated, is to the grand jurors aforesaid unknown,

did, then and there, willfully, wrongfully, unlawfully, knowingly and feloniously sell Wecol, an article in the manufacture of which denatured alcohol had been used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation issued under Title III of the National Prohibition Act, pertaining to and forbidding the sale of such article under such circumstances, in immediate containers on which there was affixed no stamp denoting the quantity of the article contained therein and evidencing payment of all Internal Revenue taxes imposed on such article; contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the United States of America. [24]

COUNT TWENTY-ONE

(T. D. 4750—Sale in Unstamped Containers)
(26-1152a)
(26-1152g)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 15th day of April, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district

of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated, is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully, knowingly and feloniously sell Wecol, an article in the manufacture of which denatured alcohol had been used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation issued under Title III of the National Prohibition Act, pertaining to and forbidding the sale of such article under such circumstances, in immediate containers on which there was affixed no stamp denoting the quantity of the article contained therein and evidencing payment of all Internal Revenue taxes imposed on such article; contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the United States of America. [25]

COUNT TWENTY-TWO

(Possession with Intent to Violate Law)
(27-157)
(27-85)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 15th day of April, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully and knowingly possess a quantity, to the grand jurors aforesaid unknown, of an article, to-wit: Wecol, in the manufacture of which denatured alcohol was used, with the intention to use it in violation of a regulation issued under Title III of the National Prohibition Act pertaining to and forbidding the sale of articles in the manufacture of which denatured alcohol was used, under circumstances from which said defendants, and each of them, might reasonably deduce that it was the intention of the purchaser to procure the same for use for beverage purposes, to-wit: to sell it under

circumstances from which said defendants might reasonably deduce that it was the intention of the purchaser to procure it for beverage purposes; contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the United States of America.

JOHN B. TANSIL
Attorney of the United States, in and for the District of Montana. [26]

[Indictment Endorsed]: No. 3443. (Title of Court and Cause.) Indictment. A true bill, R. B. Ruthardsen, Foreman. Filed in open Court this 17th day of June, A. D. 1939. C. R. Garlow, Clerk. Bail, $1000.00. Warrant to issue. Summons to issue. [27]

Thereafter, on October 18, 1939, the defendants were arraigned and entered their pleas of not guilty, the record thereof, as shown by the journal of the court, being in the words and figures following, to-wit: [28]

[Title of District Court and Cause.]

The defendants were duly called for arraignment and plea this day, the defendant corporation appearing by its attorney, Mr. Robert D. Corette, and the defendant Edgar Dehne being personally pres-

ent. Mr. John B. Tansil, the District Attorney, was present and appeared for the United States.

Thereupon the defendants were arraigned and answered that their true names are, respectively, United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne.

Thereupon, on motion of Mr. Robert D. Corette, court ordered that his name be entered as attorney for both defendants herein.

Thereupon the indictment was read to the defendants, whereupon defendants waived the time to plead and each of the said defendants entered a plea of not guilty.

The setting of the case for trial was passed at this time.

Entered in open Court at Butte, Montana, October 18, 1939.

C. R. GARLOW,
Clerk. [29]

Thereafter, on November 14, 1939, the following record of trial was entered in the minutes of the court, to-wit: [30]

[Title of District Court and Cause.]

This cause came on regularly for trial this day, the defendant corporation was present by its attorneys Mr. Robert D. Corette and Mr. William A. Davenport, and the defendant Edgar Dehne was personally present and also represented by his

counsel Mr. Robert D. Corette and Mr. William A. Davenport. Mr. R. Lewis Brown and Mr. W. D. Murray, Assistants to the District Attorney, were present and appeared for the United States.

Thereupon the impanelling of a jury was proceeded with, during the course of which Mr. John H. Crocker was called as a juror; and it appearing that said John H. Crocker is now too ill to sit as a juror in the trial of this case, by consent of all parties he was excused from attendance at this time and by the court excused until 10 A. M. tomorrow.

Thereupon the following named persons were duly impanelled, accepted and sworn as a jury to try the cause, viz:

W. F. Cassidy, C. C. Irwin, Wm. Buhl, Frank Arthur, F. E. Poe, F. E. Tyler, Richard Newgard, Melvin Nance, George A. Ames, Ralph Ahern, E. H. Young and A. C. Hammond.

Thereupon Dennis E. Denneen was called and sworn as a witness for the United States.

Thereupon the defendants objected to the introduction of any evidence herein and moved the court for a dismissal of the indictment upon the ground and for the reason that said indictment does not state facts sufficient to constitute any offense or offenses against the laws of the United States and upon other grounds stated by counsel and read into the record. [31]

Thereupon, after hearing the arguments of counsel, said objection and motion were by the court

overruled and denied as to all twenty-two counts of the indictment, on all grounds upon which said objection and motion were based, except that part of the objection and motion made concerning repeal of certain statutes, which objection and motion to that effect went only to count numbered one and counts numbered eleven to twenty-one inclusive, and as to those counts, on that ground, the objection and motion were overruled and denied pro forma. To this ruling of the court the defendants then and there excepted and exception duly noted.

Thereupon Thomas F. Murphy and Julius N. Johnson were sworn and examined as witnesses for the United States and a certain document marked Plaintiff's exhibit No. 1 was offered and received in evidence.

Thereupon John H. Cosgriff, Jack Dougherty, Roy H. Beadle, S. O. Clinton, Robert E. Dussault, Val Derana and Hugo Ringstrom were sworn and examined as witnesses for the United States, plaintiff's exhibits Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13 and 14, being bottles containing alcohol, and defendants' exhibits No. 16 and 17, being certain documents, were offered and received in evidence. Plaintiff's exhibits Nos. 11, 15, 18, 19, 20, 21 and 22, being bottles containing alcohol, were marked but not offered in evidence at this time.

Thereupon further trial of the cause was ordered continued until 10 A. M. tomorrow and the jury excused until that time.

Entered in open court at Butte, Montana, November 14, 1939.

C. R. GARLOW,
Clerk. [32]

Thereafter, on November 15, 1939, the following

RECORD OF TRIAL

was entered in the minutes of the court, to-wit: [33]

[Title of District Court and Cause.]

Defendants and respective counsel, with the jury, present as before and trial of cause resumed.

Thereupon the United States rested.

Thereupon defendants moved the court to direct the jury to return a verdict of not guilty as to each defendant and to dismiss the indictment herein, for lack of proof and on other grounds stated by counsel and read into the record, which motion was by the court denied and to which ruling the defendants then and there excepted, and exception duly noted. Thereupon court ordered that the defendants' motion to dismiss the indictment, made on yesterday, be now, in respect to count number one and counts number eleven to twenty-one inclusive, definitely and finally overruled. To this ruling of the court the defendants then and there excepted, and exception duly noted.

Thereupon Edgar Dehne, Walfred Maenpa, Damon Vigeant, Charles A. Davies, Frank Sullivan and Cyril Varcoe were sworn and examined as wit-

nesses for defendants, and a certain document, marked plaintiff's exhibit No. 23, was offered and received in evidence; whereupon the defendants rested and the evidence closed.

Thereupon the defendants renewed their motion for a directed verdict, made at the close of plaintiff's case, which motion was by the court denied and exception of defendants noted.

Thereupon, after the arguments of counsel and the instructions of the court, the jury retired in charge of sworn bailiffs to consider of its verdict, the Marshal being ordered to furnish meals and any necessary lodging to the jurors and two bailiffs.

Thereafter, at 10.20 P. M., the jury returned into Court with its verdict, the defendants and respective counsel being [34] present as before.

Thereupon the verdict of the jury was duly received by the court, read and filed, and by the jury acknowledged to be its true verdict as follows, to wit:

[Title of Court and Cause.]

"We, the jury in the above entitled cause, find the defendants guilty in manner and form as charged in the indictment on file herein.

E. H. YOUNG,
Foreman."

On motion of the defendants, the jury was polled and each juror answered that the verdict as read is his true verdict.

Thereupon court ordered that the time for sentence be continued until Monday, November 20th, 1939, at 10 A. M., and that defendant Dehne be released on the bond heretofore given, which bond shall remain in force and effect.

Entered in open court at Butte, Montana, November 15, 1939.

C. R. GARLOW,
Clerk. [35]

Thereafter, on November 20, 1939, defendant Edgar Dehne filed his Notice of Appeal herein, in the words and figures following, to-wit: [36]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Edgar Dehne, one of the above named defendants, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment rendered in favor of the plaintiff and against the defendant on November 15th, 1939, and from the judgment pronounced against the defendant on November 20th, 1939.

The name and address of appellant:

Edgar Dehne
119 West Copper Street
Butte, Montana

The name and address of appellant's attorneys:

Corette & Corette
Robert D. Corette and
Wm. A. Davenport,
619-621 Hennessy Building
Butte, Montana.

Offense: Violation of the Internal Revenue Laws of the United States relating to the carrying on of the business of a retail liquor dealer without having paid the taxes required by law therefor and with the sale of certain articles containing denatured alcohol for beverage purposes and in unstamped containers and with possession thereof with intent to violate the law. [37]

The sections alleged to have been violated are as follows:

T. D. 4750
26 U. S. C. 1397
(a) (1) 27 U. S. C. 85
26 U. S. C. 1152a
26 U. S. C. 1152g
27 U. S. C. 157
27 U. S. C. 65

Date of judgment: November 20, 1939.

Brief description of judgment or sentence:

The indictment contains 22 counts. Edgar Dehne is fined $100.00 on count 1 and given a thirty-day jail sentence under count 1 and fined $1.00 for each count from count 2 to 22 inclusive.

Edgar Dehne is not confined to jail but is on bail.

I, the above named appellant, Edgar Dehne, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above named on the grounds set forth below:

1. That regulation T. D. 4750 is unconstitutional and void.

2. That counts numbered 1, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 were brought under laws, acts and regulations which had been repealed at the time of the alleged offense.

3. That the defendant, Edgar Dehne's motion objecting to the introduction of evidence and for the dismissal of the action should have been granted.

4. That the defendant, Edgar Dehne's motion for acquittal and dismissal of the action at the close of the plaintiff's case should have been granted.

5. That the defendant, Edgar Dehne's motion for a dismissal and acquittal at the termination of the introduction of all of the evidence in the case should have been granted.

6. That the defendant, Edgar Dehne, cannot be convicted under counts 1, 4, 5, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 or 22 for the reason that the evidence [38] does not support the counts of the indictment listed in this ground.

EDGAR DEHNE

Service of the above and foregoing Notice of Appeal acknowledged and a copy thereof received this 20th day of November, 1939.

W. D. MURRAY
Assistant United States Attorney
For the District of Montana

[Endorsed]: Filed November 20, 1939. [39]

Thereafter, on November 20, 1939, the defendant Edgar Dehne's Bail Bond on appeal, as approved, was duly filed herein, in the words and figures following, to-wit: [40]

[Title of District Court and Cause.]

BAIL BOND

Know all men by these presents:

That we, Edgar Dehne, as Principal, and National Surety Company, a corporation incorporated under the laws of the State of New York, as Surety, are held and firmly bound unto the United States of America in the sum of $1,000.00 to be paid to the United States of America to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally and firmly by these presents.

Sealed with our seals and dated this 20th day of November, 1939. The condition of this obligation is such that:

Whereas, on the 17th day of June, 1939, an indictment was filed in the above entitled Court and cause against the above named defendants charging them jointly in twenty-two counts with violations of sections 26 U. S. C. 1397 (a) (1); 27 U. S. C. 85; 26-1152a; 26-1152-g; 27-157; 27-65; T. D. 4750; and

Whereas, the said defendants, United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne, were found guilty of each and all offenses charged in said indictment by a jury in the

above entitled Court and cause, and on the 20th day of November, 1939, judgment and sentence was rendered and pronounced [41] by the above entitled Court by the Judge of said Court upon both named defendants. By the judgment the defendant, Edgar Dehne, was sentenced on count one of the indictment to imprisonment for the term of thirty days, and fined thereon the sum of $100.00; that he was fined $1.00 on each of the other counts, viz., two to twenty-two inclusive; and

Whereas, on the 20th day of November, 1939, said defendant, Edgar Dehne, filed in the above entitled Court and cause his notice of appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit by which appeal it is sought to reverse the judgment and sentence imposed on him in the above entitled cause; a copy of such Notice of Appeal having been duly served upon the plaintiff, United States of America; and

Whereas, the said defendant, Edgar Dehne, on the 20th day of November, 1939, made application to be released on bail herein pending said appeal, and upon such application the above entitled Court by order duly given and made herein on the 20th day of November, 1939, ordered that defendant, Edgar Dehne, be admitted to bail pending his appeal upon furnishing a good and sufficient bond in the penal sum of $1,000.00 as provided by law.

Now, therefore, the condition of this obligation is such that if the said defendant, Edgar Dehne shall, in the event that said appeal is withdrawn or

dismissed, or in the event said judgment is affirmed, thereupon surrender himself in execution of said judgment and hold himself at all times amenable to and abide by the orders of said United States Circuit Court of Appeals for the Ninth Circuit, as well as all orders of the above entitled Court, and if said defendant fails to prosecute his appeal *or affect* or make his plea good, shall pay the fine imposed upon him, together with costs of appeal, and shall surrender himself to the custody of this Court if said judgment be affirmed or said appeal withdrawn or dismissed, then this obligation to be null [42] and void, otherwise to remain in full force and effect.

EDGAR DEHNE
Principal
NATIONAL SURETY COMPANY,
a corporation
By PAUL HUDTLOFF
Attorney in fact
Surety

Countersigned at Butte, Montana Nov. 20, 1939.
PAUL HUDTLOFF

The foregoing Bond is approved this 20th day of November, 1939.

W. D. MURRAY
Assistant United States Attorney for the District of Montana

The foregoing Bond is approved this 20th day of November, 1939.

JAMES H. BALDWIN
Judge

[Endorsed]: Filed November 20, 1939. [43]

Thereafter, on November 20, 1939, an

ORDER OF COURT RELEASING DEFENDANT EDGAR DEHNE FROM CUSTODY, AND ADMITTING HIM TO BAIL PENDING APPEAL,

was duly filed and entered herein, in the words and figures following, to-wit: [44]

[Title of District Court and Cause.]

On application of the defendant, Edgar Dehne, for admission to bail pending his appeal now being taken in the above entitled cause, it is ordered that the defendant, Edgar Dehne, be admitted to bail and released from custody pending his appeal and that he furnish a good and sufficient bond in the penal sum of $1,000.00, as provided by law.

Dated this 20th day of November, 1939.

JAMES H. BALDWIN
Judge

[Endorsed]: Filed and entered November 20, 1939. [45]

Thereafter, on November 21, 1939, the defendant United Cigar Whelan Stores Corporation, a corporation, filed its Notice of Appeal herein, in the words and figures following, to-wit: [46]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that United Cigar Whelan Stores Corporation, a corporation, one of the above named defendants, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment rendered in favor of the plaintiff and against the defendant on November 15th, 1939, and from the judgment pronounced against the defendant on November 20th, 1939.

The name and address of appellant:

United Cigar Whelan Stores Corporation,
a corporation,
54 North Main Street
Butte, Montana

The name and address of appellant's attorneys:

Corette & Corette
Robert D. Corette and
Wm. A. Davenport
619-621 Hennessy Building
Butte, Montana.

Offense: Violation of the Internal Revenue Laws of the United States relating to the carrying on of the business of a retail liquor dealer without having paid the taxes required by law therefor and with the sale of certain articles containing denatured alcohol for beverage purposes and in unstamped con- [47] tainers and with possession thereof with intent to violate the law.

The sections alleged to have been violated are as follows:

T. D. 4750
26 U. S. C. 1397
(a) (1) 27 U. S. C. 85
26 U. S. C. 1152a
26 U. S. C. 1152g
27 U. S. C. 157
27 U. S. C. 65

Date of judgment: November 20th, 1939.

Brief description of judgment or sentence:

The indictment contains twenty-two counts. United Cigar Whelan Stores Corporation, a corporation, is fined $2500.00 on the first count, and $200.00 on each count from count two to twenty-one inclusive, and $1,000.00 on count twenty-two.

The above named appellant, United Cigar Whelan Stores Corporation, a corporation, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above named on the grounds set forth below:

1. That regulation T. D. 4750 is unconstitutional and void.

2. That counts numbered 1, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 were brought under laws, acts and regulations which had been repealed at the time of the alleged offense.

3. That the motion of the defendant, United Cigar Whelan Stores Corporation, a corporation, objecting to the introduction of evidence and for the dismissal of the action should have been granted.

4. That the motion of the defendant, United Cigar Whelan Stores Corporation, a corporation,

for acquittal and dismissal of the action at the close of the plaintiff's case should have been granted.

5. That the motion of the defendant, United Cigar Whelan Stores Corporation, a corporation, for a dismissal and acquittal at the termination of the introduction of all of the evidence in the case should have been granted. [48]

6. That each and all of the objections of the defendant, United Cigar Whelan Stores Corporation, a corporation, which were overruled by the Court, should have been sustained.

Dated November 21st, 1939.

UNITED CIGAR WHELAN
STORES CORPORATION,
a corporation,
By ROBERT D. CORETTE
One of its Attorneys.

Service of the above and foregoing Notice of Appeal acknowledged and copy thereof received this 21st day of November, 1939.

W. D. MURRAY
Assistant United States District Attorney

[Endorsed]: Filed November 21, 1939. [49]

Thereafter, on November 21, 1939, the defendant United Cigar Whelan Stores Corporation, a corporation, filed its bond guarantying payment of fines and penalties and cost bond on appeal, as approved, herein in the words and figures following, to-wit: [50]

[Title of District Court and Cause.]

BOND GUARANTYING PAYMENT OF FINES AND PENALTIES AND COST BOND

Know All Men by these presents:

That we, United Cigar Whelan Stores Corporation, a corporation, as Principal, and National Surety Corporation, a corporation incorporated under the laws of the State of New York, as Surety, are held and firmly bound unto the United States of America in the sum of Nine Thousand and no/100 Dollars to be paid to the United States of America to which payment well and truly to be made we bind ourselves, successors and assigns, jointly and severally and firmly by these presents.

Sealed with our seals and dated this 21st day of November, 1939. The condition of this obligation is such that:

Whereas, on the 17th day of June, 1939, an indictment was filed in the above entitled Court and cause against the above named defendants charging them jointly with carrying on the business of a retail liquor dealer without having paid the tax required by law therefor and with the sale of certain articles containing denatured alcohol for beverage purposes, and in unstamped containers, and with possession thereof with intent to [51] violate the law, as more fully appears from the said indictment on file in the office of the Clerk, and contrary to the statutes of the United States, and in violation of the peace and dignity of the United States, in

twenty-two counts with violations of sections 26 U.S.C. 1397 (a) (1); 27 U.S.C. 85; 26 U.S.C. 1552a; 26 U.S.C. 1152g; 27 U.S.C. 157; 27 U.S.C. 65; T.D. 4750; and

Whereas, the said defendants, United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne, were found guilty of each and all offenses charged in said indictment by a jury in the above entitled Court and cause, and on the 20th day of November, 1939, judgment and sentence were rendered and pronounced by the above entitled Court by the Judge of said Court upon both named defendants. By the judgment the defendant, United Cigar Whelan Stores Corporation, a corporation, was fined on count one of the indictment the sum of $2,500.00; that it was penalized $200.00 on each of counts two to twenty-one inclusive, and was penalized $1,000.00 on count numbered twenty-two; that the fine and penalties against the United Cigar Whelan Stores Corporation, a corporation, imposed by the said judgment totaled the sum of $7500.00; and

Whereas, on the 21st day of November, 1939, said defendant, United Cigar Whelan Stores Corporation, a corporation filed in the above entitled Court and cause its notice of appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit by which appeal it is sought to reverse the judgment and fine imposed on it in the above entitled cause; a copy of such Notice of Ap-

peal having been duly served upon the plaintiff, United States of America.

Now, therefore, the condition of this obligation is such that if the said defendant, United Cigar Whelan Stores Corporation, a corporation, shall, in the event that said appeal is withdrawn or dismissed, or in the event said judgment is affirmed, thereupon hold itself at all times amenable to and abide by the [52] orders of said United States Circuit Court of Appeals for the Ninth Circuit as well as all orders of the above entitled Court, and if said defendant fails to prosecute its appeal or effect or make its plea good, it shall pay the fines and penalties imposed upon it, together with costs of appeal, then this obligation to be null and void, otherwise to remain in full force and effect.

UNITED CIGAR WHELAN STORES CORPORATION, a corporation,

By WM. A. DAVENPORT
One of its Attorneys,
Principal.

[Corp. Seal] NATIONAL SURETY CORPORATION, a corporation,

By PAUL HUDTLOFF
Attorney-in-Fact,
Surety.

Countersigned at Butte, Montana, November 21, 1939.

PAUL HUDTLOFF.

The foregoing Bond is approved this 21st day of November, 1939.

R. LEWIS BROWN
Assistant United States Attorney for the District of Montana.

The foregoing Bond is approved this 21st day of November, 1939.

JAMES H. BALDWIN,
Judge.

[Endorsed]: Filed November 21, 1939. [53]

Thereafter, on November 21, 1939, an Order of court staying execution on any and all proceedings to enforce the judgment entered against the defendant United Cigar Whelan Stores Corporation, a corporation, on November 20, 1939, during the pendency of its appeal, was filed and entered herein in the words and figures following, to-wit: [54]

[Title of District Court and Cause.]

ORDER

Whereas, the defendant, United Cigar Whelan Stores Corporation, a corporation, has filed with this Court a good and sufficient bond for the staying of the execution of judgment granted against it in the above entitled cause, which judgment was entered on November 20th, 1939.

Now, therefore, it is ordered and this does order that execution be stayed on any and all proceedings to enforce the judgment entered against the United Cigar Whelan Stores Corporation, a corporation, on November 20th, 1939, during the pendency of its appeal.

Dated this 21st day of November, 1939.

JAMES H. BALDWIN,
Judge.

[Endorsed]: Filed and entered Nov. 21, 1939. [55]

Thereafter, on December 19, 1939, an Order of Court directing the Clerk thereof to transmit to the United States Circuit Court of Appeals for the Ninth Circuit defendants' original Exhibits 16 and 17 and plaintiff's original Exhibit 23 with the record on appeal herein was filed and entered in the words and figures following, to-wit: [56]

[Title of District Court and Cause.]

ORDER

It is hereby ordered and this does order the clerk of the above entitled Court to forward with the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco, California, defendants' original Exhibits 16 and 17 and plaintiff's original Exhibit 23,

said exhibits being for use by the Circuit Court at the time of hearing the appeal.

Dated this 19th day of December, 1939.

JAMES H. BALDWIN,
Judge.

[Endorsed]: Filed and entered December 19, 1939. [57]

Thereafter, on December 19, 1939, defendants' Praecipe for transcript of record was duly filed herein, in the words and figures following, to-wit: [58]

[Title of District Court and Cause.]

PRAECIPE

To the Honorable Charles R. Garlow, Clerk of the Above Entitled Court:

You are hereby requested to prepare and certify to the United States Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco, California, a Transcript of the record in the above entitled cause for the purpose of appeal taken herein from the judgment of the above entitled Court, pronounced, made and entered on November 20th, 1939.

The defendants, United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne, hereby designate and indicate the portions of the records, papers and files to be incorporated in said Transcript of Appeal as follows:

1. Indictment.
2. Plea of not guilty entered by both defendants.
3. Record of trial.
4. Record of trial and verdict.
5. Notice of appeal filed on behalf of Edgar Dehne.
6. Bail bond of Edgar Dehne in the amount of $1,000.00.
7. Order admitting Edgar Dehne to bail.
8. Notice of appeal for United Cigar Whelan Stores Corporation, a corporation.
9. Bond of United Cigar Whelan Stores Corporation, a corporation, in the amount of $9,000.00.
10. Order staying execution pending appeal.
11 Bill of exceptions settled and allowed by the Court.
12. Order to forward defendants' Exhibits 16 and 17 and plaintiff's Exhibit 23. [59]
13. Defendants' Exhibits 16 and 17, and plaintiff's Exhibit 23.
14. And this praecipe.

Dated this 19th day of December, 1939.

CORETTE & CORETTE
ROBERT D. CORETTE,
WM. A. DAVENPORT
Attorneys for Defendants,
United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne.

Service of the above and foregoing Praecipe acknowledged and copy thereof received this 19th day of December, 1939.

R. LEWIS BROWN
Assistant United States Attorney.

[Endorsed]: Filed December 19, 1939. [60]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD

United States of America,
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 60 pages, numbered consecutively from 1 to 60, inclusive, is a full, true, and correct transcript of the record and proceedings designated by the parties as the record on appeal in case No. 3443, United States of America, Plaintiff, v. United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne, Defendants, as appears from the original files and records of said District Court in my custody as such Clerk.

I further certify that transmitted herewith are the original Bill of Exceptions and Assignment of Errors in said cause.

I further certify that the costs of said transcript amount to the sum of Fifteen and 95/100 Dollars, ($15.95) and have been paid by the appellants.

Witness my hand and the seal of said District Court at Butte, Montana, this 26th day of December, 1939.

[Seal] C. R. GARLOW,
Clerk as Aforesaid.
By HAROLD [?] ALLEN
Deputy Clerk. [61]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be it remembered, that this cause came on regularly for trial before the Honorable James H. Baldwin, Judge of the District Court of the United States, in and for the District of Montana, Butte Division, sitting with a jury, on Tuesday, November 14, 1939, R. Lewis Brown and W. D. Murray, appearing as attorneys for plaintiff, and R. D. Corette and William Davenport, appearing as attorneys for the defendants.

Thereupon, the following proceedings were had, orders made, objections interposed, rulings made by the court, and exceptions taken, and the proceedings, orders and exceptions hereinafter appearing had and taken thereon, and the evidence and testimony hereinafter set out, being all the evidence and testimony offered and introduced and

offered and rejected. The testimony and evidence hereinafter set out was and is all the testimony and evidence heard by the court, and was and is all the testimony and evidence offered by the parties to this cause and received by [62] the court and offered by the parties to this cause and rejected by the court, to-wit: [63]

D. E. DENEEN,

a witness called on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Brown

Q. Will you state your name, please?

A. Dennis E. Deneen.

Q. And your residence?

A. Helena, Montana.

Mr. Corette: If the court please defendants desire to make a motion at this time, and we would like the privilege of arguing the motion to the court.

(Jury excused from the court room.)

Mr. Corette: If the court please, comes now the defendants, United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne, and object to the introduction of any evidence and ask for a dismissal of the indictment upon the following grounds and for the following reasons: First, that the indictment does not state facts sufficient to constitute an offense or offenses against the laws of the

(Testimony of D. E. Deneen.)

United States; second, that the facts set forth in counts one to twenty-two, inclusive, of the indictment, do not state facts sufficient to constitute any offense against the laws of the United States; third, that counts number one, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, and twenty-one charge the defendants with offenses committed against the Revenue Laws of the United States between the dates of March 9, 1939 and April 15, 1939; that prior to that time, and on February 10, 1939, the Internal Revenue Code was re-enacted and the old Internal Revenue Code was repealed; that the sections under which the indictments are brought in these counts which I have specified were brought under the old law and which was repealed on [64] February 10, 1939; the acts set forth in the indictment having occurred in March and April of 1939, therefore, at the time of the indictment, and as to these specified counts, there was no law under which the indictment could be brought.

And as to for a further grounds, these defendants object to the introduction of any evidence and ask for a dismissal of the indictments upon the grounds and for the reasons that regulation 4970, upon which all of the counts numbered one to twenty-two, inclusive, and the entire indictment is based—that is Treasury Decision 4750—is in denial of due process of law, is unconstitutional and void.

(Testimony of D. E. Deneen.)

The Court: (After argument and remarks) On the ground of uncertainty of the statute, the motion is definitely overruled. On the question of repeal of the statute on which the prosecution is based, the objection is overruled pro forma.

Mr. Corette: May we have an exception?

The Court: You may.

Mr. Corette: And may we have an exception to the ruling pro forma, also?

The Court: That is to whether or not the statute upon which the prosecution is based as, or has not been repealed?

Mr. Corette: Yes.

The Court: Very well, the exception will be noted.

(Recess until 2:00 o'clock p. m. same date, at which time the trial of the above entitled cause was resumed.) [65]

THOMAS F. MURPHY,

called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Brown:

Q. What is your name?

A. Thomas F. Murphy.

Q. Where do you live, Mr. Murphy?

A. At Seattle, Washington.

(Testimony of Thomas F. Murphy.)

Q. And what is your occupation?

A. I am a special investigator for the Alcohol Tax Unit for the Bureau of Internal Revenue.

Q. That is a department of the United States Government? A. United States Treasury.

Q. How long have you been employed by the United States Government?

A. For approximately twelve years.

Q. And were you in such employ all of this year up to the present time? A. Yes.

Q. Now, do you know by sight or otherwise the defendant Edgar Dehne?

A. Yes, I have seen him in the United Cigar Store here in Butte.

Q. And when and where did you first see him?

A. I saw him in the United Cigar on January 12, 1939.

Q. Was any one there with you, or accompanied you to the place? A. Yes.

Mr. Corette: We object to the introduction of any testimony prior to March 9, 1939, which is the date of the first [66] offense set forth in the indictment; and for the further ground it is incompetent, irrelevant, and immaterial.

The Court: Overruled.

Mr. Corette: Exception, please.

The Court: Exception will be noted.

Q. Did you have a conversation with him?

(Testimony of Thomas F. Murphy.)

A. I was accompanied by investigator in charge, Mr. Deneen, and investigator Mr. Cosgriff, of the Alcohol Tax Unit. Yes, I had a conversation with Mr. Dehne.

Q. Did you inquire of him who the manager of the store was? A. Yes, I did.

Q. What did he say?

A. He said he was the manager.

Q. Go ahead and relate to the court and jury the conversation you had at that time.

A. I told him we were from the Bureau of Internal Revenue, and I asked him if he handled rubbing alcohol in the cigar store, and he said he did. I asked him if he placed any restriction on the sale of it, and he said no, that he sold it to any one who asked for it, and I asked him under all conditions, and he said yes. So, I then told him of the contents of Treasury Decision 4750, and told him it placed a definite restriction on the sale of rubbing alcohol. I also reminded him he had been twice warned before that he was selling this alcohol for beverage purposes, and he admitted that he had received two previous warnings.

The Court: Tell us what he said, and not what he admitted, that is your conclusion.

The Witness: He told me: "Yes, that was true." Mr. [67] Cosgriff was there, and he admitted he had been warned twice by Mr. Cosgriff.

(Testimony of Thomas F. Murphy.)

The Court: The court's order is that you use his words as nearly as you recall and not state your conclusion as to what he did or did not. Just what you said and what he said.

The Witness: I told him that he had been twice warned before, and he admitted that; he said that that was true.

The Court: Just a minute: I told you not to state your conclusions. Use his words. What did he say?

The Witness: He said that was true, that he had been warned twice before.

Q. Just proceed with the rest of the conversation as you recall it.

A. I explained, I told him that the Treasury Decision 4750 places a definite responsibility on the seller of denatured alcohol. He stated that he received the alcohol from the headquarter's office in San Francisco; that they stocked him with the alcohol, and as long as they continued to stock the Butte store with alcohol that he would sell it to any one who came in and asked for it.

Q. Was that the conversation as you recall it?

A. Yes. I also told Mr. Dehne that some of this was being diverted for beverage purposes, and he said he was aware of that, but he repeated again, as long as the San Francisco office furnished him with alcohol that he was going to sell it.

Q. Is that all the conversation now? Have you given it as you recall it?

(Testimony of Thomas F. Murphy.)

A. Yes, that is the conversation as I recall it.

Mr. Brown: I offer in evidence, if the court please, Government's Exhibit 1, the certificate from the Secretary of [68] State that the defendant corporation is a corporation.

Mr. Corette: No objection.

The Court: It will be admitted.

Which said document was marked Plaintiff's Exhibit 1 and is as follows:

"3443

PLFFS. EX. 1

"Department of the Secretary of State
(Cut of the State Capitol Building)
of the
State of Montana

"I, Sam W. Mitchell, Secretary of State of the State of Montana, do hereby certify that

United Cigar-Whelan Stores Corporation, a corporation organized and existing under the laws of the State of Delaware, filed in this office, as required by law, on February 17, A. D. 1938, a duly certified copy of its Articles of Incorporation and was on said date qualified to do business in the State of Montana and is at the date of this certificate qualified to do business in the State of Montana.

In witness whereof, I have hereunto set my hand and affixed the Great Seal of the State of Montana,

(Testimony of Thomas F. Murphy.)

at Helena, the Capital, this seventh day of November, A. D. 1939.

(s) SAM W. MITCHELL
Secretary of State.

By
Deputy.

[The Great Seal of the
State of Montana]

Mr. Brown: You may cross examine. [69]

Cross Examination

By Mr. Corette:

Q. This conversation took place, Mr. Murphy, in January of 1939? A. Yes.

Q. Do you remember the date?

A. On the 12th of January.

Q. At the same time, did you have Mr. Dehne sign any papers? A. No, I didn't.

Q. Did Mr. Cosgriff?

A. Not on that occasion, no.

Q. Did Mr. Deneen?

A. Not on that occasion, no.

Q. You stated that you told Mr. Dehne that this alcohol was being used for beverage purposes?

A. Yes, I did.

Q. How did you know that?

A. Well, either the same day or the day before I had talked to a man in the City jail who had been arrested by the police, and he was just sobering up

(Testimony of Thomas F. Murphy.)

from a drunk, and the police had taken a bottle of rubbing alcohol away from him, and this man that talked to me told me that he bought the alcohol at the United Cigar Store.

Witness excused. [70]

JULIUS JOHNSON,

called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Brown:

Q. What is your name?

A. Julius Johnson.

Q. Where do you reside?

A. Cour d' Alene, Idaho.

Q. What is your occupation?

A. Investigator in the Alcohol Tax Unit Bureau of Internal Revenue.

Q. For the United States Government?

A. Yes, sir.

Q. And how long have you been such investigator, Mr. Johnson?

A. About fifteen years.

Q. And were you from the first of the year, up to the present time, steadily employed as investigator, as you have testified? A. Yes, sir.

(Testimony of Julius Johnson.)

Q. Do you know the defendant, Edgar Dehne, by sight or otherwise? A. I do.

Q. When, if you recall, did you first see him?

A. First I saw him, it was on the 9th.

Q. Of what month?

A. Day of March, 1939.

Q. And do you have a recollection of about the time of day it was?

A. Yes, sir, 4:25 in the afternoon, the first time.

[71]

Q. Now, what place did you go, what place did you see him at that time?

A. At the United Cigar Store, at the corner of Main and Broadway, No. 34 North Main, City of Butte, Silver Bow County.

Q. What state, Mr. Johnson?

A. Montana.

Q. What was your purpose in going there?

A. I was sent there.

Q. Just tell me what you intended to do when you got there?

A. I was intending to buy rubbing alcohol.

Q. How were you dressed when you went in?

A. I was dressed in old overalls, a lumber jacket, shirt, and old sweater, a lumber jacket mackinaw, and slouch hat.

Q. And you say Mr. Dehne, the defendant, was in the place at the time? A. Yes, sir.

Q. Now, what did you say to him?

(Testimony of Julius Johnson.)

A. I walked up to the counter and Mr. Dehne was behind the counter, and I said: "Give me a package of cigarettes." He gave me the package of Chesterfields. And I said: "Give me a pint of alcohol." And he gave it to me and wrapped it up in a paper and handed it to me, and I walked out. I paid him thirty cents, fifteen cents for the alcohol and fifteen cents for the cigarettes.

Q. What hour of the day was that, if you recall, what hour?

A. That was at 4:25 in the afternoon.

Q. When next did you see the defendant, Dehne, if you did see him?

A. At 5:25 in the afternoon, when I went back there [72] again.

Q. The same afternoon? A. Yes, sir.

Q. An hour later? A. Yes, sir.

Q. Were you dressed any differently than you were the first time you went in?

A. No, sir, dressed the same way.

Q. What did you do?

A. I walked in. Mr. Dehne was behind the bar. I handed down fifteen cents, ten cents in silver and five pennies, and I said: "Give me a bottle of alcohol." He reached under the counter and got it and wrapped it up and handed it to me, and I walked out.

Q. Now, when were you next in the store?

A. The same evening at 7:25.

(Testimony of Julius Johnson.)

Q. Were you dressed any differently then than you have described being dressed when you first went in? A. No, sir; was the same clothes.

Q. Was there any one in there behind the counter on that occasion?

A. Cyril Varco was the name of the fellow that is clerking, was in there in charge.

Q. What, if anything, did you say to that person?

Mr. Corette: We object to the introduction of any evidence concerning any other person that Mr. Dehne, who is the person indicted in this complaint. The indictment reads: "To the defendants" thruout, which would mean Edgar Dehne and the United Cigar Store.

The Court: Overruled. [73]

Mr. Corette: Exception.

The Court: Exception noted.

Q. All right. Now tell me what was said by you and Varco, the clerk behind the counter.

A. I walked up to the counter and I said: "Give me a box of snuff." He gave me the package, and I paid him ten cents, and I said: "Give me a bottle of alcohol, too, will you?" And he wrapped up a bottle of rubbing alcohol, and hands it to me and I walked out.

Q. When were you next in the store?

A. What?

Q. When was the next time?

A. At 8:20, or 8:25, the same evening.

(Testimony of Julius Johnson.)

Q. Who, if any one, did you see?

A. Varco was behind the counter.

Q. What, if anything, did you say at that time to Varco?

A. I laid down fifteen cents and told him that I wanted a bottle of alcohol. The same thing, he wrapped up a bottle of alcohol and handed it to me, and I walked out.

The Court: What day was this?

The Witness: This was on the 9th of March, 1939.

Q. Now, when were you next in the store, if you were in there again?

A. The next morning, which was March 10, 1939.

Q. At what time of day.

A. About 10:20 in the forenoon.

Q. Whom did you see in the store at that time?

A. Edgar Dehne, the defendant, was behind the counter. I walked in and I said: "Give me another bottle of alcohol." He [74] wrapped up another bottle of rubbing alcohol, gave it to me and I walked out.

Q. Now, when were you next in the store?

A. At about 12:20, or right after lunch, I went in again.

Q. On the same day?

A. On the same day. Clerk Varco was behind the counter. I said: "Give me another bottle of alcohol." Threw down the money, he wrapped up the bottle of alcohol, and handed it to me.

(Testimony of Julius Johnson.)

Q. When were you next in the store?

A. At about 5:00 o'clock in the afternoon, or 5:05.

Q. On what day?

A. Same day, March 10th.

Q. Who was clerking in there at that time?

A. Varco. The clerk was behind the counter.

Q. And what did you say?

A. I said: "Give me another bottle of alcohol." He reaches under the counter; wraps me up a pint of rubbing alcohol, takes my money, and I walks out.

Q. When were you next in the store?

A. I wasn't in there, back again, until the 14th of March.

Q. On March 10th you testified you went in there at 12:20, is that right? A. What?

Q. You said you were in there March 10th at 12:20 p. m.

A. Yes, I was in there on the 10th at 5:00 o'clock and went back in again at 7:00 o'clock on the 10th.

Q. On the 10th you went in there again?

A. Yes, sir. [75]

Q. Who did you see in there at that time?

A. The defendant.

Q. Mr. Dehne? A. Yes, sir.

Q. What was said by you to him?

A. The same thing. I threw down my money and said: "Give me another bottle of alcohol." He

(Testimony of Julius Johnson.)

wraps up another bottle of alcohol and takes my money, and I walks out.

Q. Now, on these occasions that you have testified to going in and purchasing this alcohol, were you dressed any differently than you have testified you were dressed the first time you went in?

A. I had the same clothes on.

Q. Now, at any time, on any of these occasions, did either the defendant Dehne or Varco inquire of you as to what you were going to do with the alcohol? A. They did not.

Q. Or why you came back after this alcohol?

A. No, sir; they said nothing; there was no word spoken.

Q. Except what you testified to?

A. Except what was spoken by me.

Q. When was the next time you went in the place?

A. I went in there again on the 14th of March.

Mr. Corette: Object to the introduction of any evidence as to any purchase on the 14th of March as beyond the issues of the complaint or indictment.

The Court: The objection is sustained.

Q. Now, aside from the 14th, Mr. Johnson, when were you next in the store? [76]

A. On the 15th.

Q. Of what month?

A. April, I believe. Could I refresh my memory on that?

Q. Have you some notes you made?

(Testimony of Julius Johnson.)

A. Yes, sir.

Q. Were those made in your own handwriting?

A. Yes, sir, the ones I made at the time.

Q. Did you accurately set down what had occurred there? A. Yes, sir.

Q. And did that show the truth?

A. Yes, sir.

Q. And are you unable to recall this matter of dates without referring to your notes?

A. Yes, sir.

Q. All right, what day did you go in there?

A. April 15th.

Q. At what time?

A. About 9:15 in the forenoon.

Q. Who did you find in there at that time?

A. There was another clerk in there. His name is— I will have to refresh my memory on that name; I can't recall it.

Q. All right, refresh your memory from the notes made by you at the time of the occurrence, or soon after. A. Walfred Maenpa.

Q. And what did you say to this clerk?

A. He was using the telephone when I walked in, and I walked up to the counter, and he walked behind the counter, and said: "What is it?" And I said: "Give me a pint of alcohol." So he reaches under the counter, gets out a bottle of alcohol, and [77] starts to wrap it up. I said: "Haven't you got the other brand. I like that better to drink than I do this." And he said: "No, that is all I got.

(Testimony of Julius Johnson.)

"Well" I says, "that is all right, I can drink it." I said: "Either one will put hair on your chest." So he wrapped it up and I paid him fifteen cents and walked out.

Q. And when were you next in the store?

A. The same forenoon, the same day, at 10:45 in the morning.

Q. What clerk did you find in there at that time? A. The same clerk.

Q. All right; what, if anything, did you say to him?

A. I went up to the counter, and I said: "Give me four pints of alcohol, will you?" I said: "That other pint didn't last long with four or five of us drinking out of it." And he just laughed and he wrapped up four pints of rubbing alcohol, and I gave him a dollar, and he gave me forty cents back in change, which made sixty cents for the four bottles.

Q. Did you see displayed at any place in that store a United States Government Twenty-five Dollar Tax Stamp permitting the carrying on of retail liquor dealer's business in that store?

A. I didn't see any, and I looked for it.

Q. I will show you, Mr. Johnson, plaintiff's Exhibit 2. After you look at that, tell me whether or not you have seen that before? A. Yes, sir.

Q. And when and where did you first see it?

A. That is the first bottle of rubbing alcohol I purchased from the defendant, Mr. Dehne, at 4:25

(Testimony of Julius Johnson.)

the afternoon of March 9, 1939. Of course, it was full at that time. Samples were taken out of it. [78]

Q. Showing you Plaintiff's Exhibit 3, have you seen that before, and which buy was that?

A. That was the second buy at 5:25, purchased from the defendant, and it was a full bottle.

Q. Now, showing you Plaintiff's Exhibit 4, I will ask you if you have seen that before?

A. Yes, sir. That is the third bottle that I purchased at the United Cigar Store from the clerk.

Q. Now, showing you Plaintiff's Exhibit 5, I will ask you if you have seen that before?

A. Yes, sir. That was the last bottle I purchased on March 9, at 8:25 p. m., from the clerk.

Q. And showing you Plaintiff's Exhibit 6, I will ask you if you have seen that before?

A. Yes, sir. A bottle purchased from the defendant at 10:20 in the morning on the 10th of March.

Q. And the Government's Exhibit 7. Have you seen that before?

A. Yes. This is a bottle I purchased from the clerk at 12:20 p. m. of March 10, 1939, at the United Cigar Store.

Q. And the Government's Exhibit 8. Have you seen that before?

A. Yes, I purchased that at 5:05 in the afternoon on March 10, 1939, at the United Cigar Store.

Q. And Exhibit 9. Have you seen that before?

(Testimony of Julius Johnson.)

A. Yes. I purchased that bottle from the defendant at the United Cigar Store at 7:00 p. m. March 10, 1939.

Q. And the Government's Exhibit 10. Have you seen that before?

A. Yes, sir. That is the first bottle I purchased [79] from the clerk on April 15, Walfred Maenpa, or whatever his name is.

Q. And Exhibit 11. Have you seen that before?

A. Yes, sir. That is a bottle that was purchased from Walfred Maenpa at the United Cigar Store.

Q. On what date?

A. That was April 11, 1939.

Mr. Corette: We ask that that be stricken.

The Court: It will be stricken as not within the issues, and, Gentlemen of the Jury, you will pay no attention to it.

Q. Exhibit 12?

A. That is one of the bottles, of the four bottles that was purchased at the United Cigar Store on April 15, 1939.

Q. Exhibit 13?

A. That is one of the four bottles I purchased on April 15.

Q. And Exhibit 14?

A. That is one of the four bottles purchased on April, 15, 1939, from the clerk Maenpa.

Q. Now, I will ask you, Mr. Johnson, whether or not all of these bottles were full at the time they were purchased? A. They were.

(Testimony of Julius Johnson.)

Q. I will ask you whether or not there was on any one of these bottles any United States government strip tax stamp, denoting the quantity and quality of the liquor? A. There was not.

Q. You are familiar with those stamps?

A. Yes, sir.

Q. And you say there was not? [80]

A. No.

Q. Was there any government stamp of any kind on the top of the bottle? A. No.

Q. Now, what did you do with those bottles of alcohol and each of them after you had purchased them?

A. I turned them over to the investigator of Alcohol Tax Unit, John Cosgriff, here in this Federal Building, at his office.

Q. At his office? A. Yes, sir.

Q. Now, there has been some quantity taken out of each of these bottles. Do you know by whom and under what circumstances, and when they were taken out? A. Yes, sir.

Q. Will you tell us about that?

A. Myself and Mr. Cosgriff took out about half out of each bottle and put it in a smaller bottle to be shipped to the Seattle head office to be analyzed.

Q. By whom?

A. Well, the chemist at Seattle.

Q. Will you tell us just how you took the sample out of each bottle, what you did?

(Testimony of Julius Johnson.)

A. Well, I opened the bottle, and Mr. Cosgriff would pour it in a small funnel, as much as he wanted, into a smaller bottle, and I would take that bottle and cork it, and put a sealing wax on it, and then we would label and initial the small bottle sent away the same as the original bottle was.

Q. And, on the sealing wax was there any impression of any kind made? [81]

A. Yes, from the Alcohol Tax Unit badge was put on the top of the sealing was before it was hard.

Q. I will show you Plaintiff's Exhibit 15 and ask you to tell me about that, Mr. Johnson.

A. That is a sample that was sent to Seattle out of an original bottle that I purchased.

Q. No, there is a label on that.

A. It is the same label that Mr. Cosgriff and I put on.

Q. You and Mr. Cosgriff put the label on there?

A. Yes, sir.

Q. And you spoke of initialling it. Do you find any initial there?

A. Yes, sir, I got my name on it.

Q. You got your name on that?

A. Yes, on all of them.

Q. Were the other samples that were sent down sent down on any differently than this one here?

A. Well, maybe a little more or maybe a little less, but tried to get about half a bottle.

Q. The same size bottle?

A. Yes, about the same.

(Testimony of Julius Johnson.)

Q. And with the identical label shown on that sample?

A. Yes, the same principle, but different times or days, I guess.

Q. Now, you spoke of having taken out a quantity which you said you took out, you and Mr. Cosgriff, to be sent to a chemist. I will ask you whether or not during the times that any of these government exhibits from number two to fourteen, not including exhibit marked 11, whether there was any change or alterations made by you at all in the contents of any of those bottles [82] while they were in your possession? A. There was not.

Q. Will you say what is the fact as to whether or not at the time you turned them over finally to Mr. Cosgriff, the bottles and their contents were in the same condition as when you purchased them, except for the sample, which you testified you took out? A. They were.

Q. Now, on each of these bottles there was a printed label, Mr. Johnson? A. Yes, sir.

Q. And on each of the bottles there is some writing on there? A. Yes, sir.

Q. Will you look at Exhibit 5 and tell me whose writing that is and when that was put on?

A. That is mine.

Q. And did you put writing on the other labels as on each exhibit conveying the same information that you wrote there?

A. I would write the time of day on all, on this

(Testimony of Julius Johnson.)

label here, and then when I got them to the office we put this label on them so I wouldn't get them mixed up.

Q. You say "this" label. You have indicated a white label on the back, extending over onto both sides of each bottle, with handwriting and typewriting? A. Yes, sir. We put that on.

Q. You and Mr. Cosgriff? A. Yes, sir.

Q. Except for the writing that appears on the printed label on each bottle, was there any other change made in the [83] printed label or the prints on each bottle? A. No, sir.

Mr. Brown: You may cross examine.

Cross Examination

By Mr. Corette:

Q. Mr. Johnson, when you first went in the United Cigar Store on 4:25 p. m., on the night of March 9, 1939, how many people were in the store?

A. I couldn't say. There was only two or three. This is a very small place, and not over two or three at any time.

Q. On the 9th of March, at 4:25 p. m., how many people were in there?

A. I never counted the number of people. They were generally busy waiting on customers, and I would walk up to the counter.

Q. Was that true at all times you testified you went in there?

A. No, the first time that I went in on April 15th there was no one in there except the clerk that was

(Testimony of Julius Johnson.)

using the telephone. That is the only time I recall when there wasn't a customer in there.

Q. At all other times, except on the 15th of April, when the clerk was using the telephone, there were other customers in there besides yourself?

A. Yes.

Q. After you and Mr. Cosgriff emptied half of these bottles into the smaller bottles, what did you do with the bottles which are here on this table?

A. Put the cap back on and put the sealing wax on which is still on. [84]

Q. Sealing wax so they couldn't be opened?

A. Yes, sir.

Q. And where did you put them?

A. Mr. Cosgriff put the bottles in a box and locked them up in the safe or vault.

Q. Then they left your possession at the time you turned them over to Mr. Cosgriff?

A. Yes.

Q. Now, you have told Mr. Brown that when you were in the store, or at the time you left the store, rather, that you made some notations on the front of these bottles?

A. Yes, I believe on every one.

Q. Showing you Plaintiff's Exhibit 2, I will ask you if you made this notation on the front of the bottle, on the label of the bottle? A. Yes.

Q. That is your handwriting? A. Yes.

Q. And then I believe you stated when you got together with Mr. Cosgriff——

(Testimony of Julius Johnson.)

A. He made this up and I signed it. He made it out on the typewriter.

Q. And you then put this on?

A. Put this on afterwards, yes.

Q. Did you make that for every bottle?

A. I am sure we did unless I would walk right out, walk right up where I could make a label at once.

Q. What would you say as to Plaintiff's Exhibit 6?

A. That is one of them that I walked right up to the [85] office with.

Q. What day was that?

A. That was purchased on the 3-10, at 10:00 o'clock in the morning, or 10:20 in the morning.

Q. What did you do with that bottle?

A. Walked right up to the Federal office with it.

Q. Then what did you do with it?

A. Made a label and turned it over to John Cosgriff.

Q. Each one of these bottles had a label made for them individually, after you purchased them?

A. Yes, the white label in front.

Q. Showing you Exhibit No. 7, I will ask you if you wrote anything on the face of that bottle?

A. No, I never wrote anything on the face of it. I went direct to Mr. Cosgriff's office, because I would carry it right up. And if I took it up to the hotel room first, then I would write on it.

(Testimony of Julius Johnson.)

Q. And that exhibit, what time did you make that purchase, and on what date?

A. That is on the 10th, at 12:20 p. m.

Q. Do you remember whether you came directly up to the Federal Building?

A. Yes, I know I did, as long as there is no writing on it.

Q. I hand you Plaintiff's Exhibit Number 9, and I will ask you if there is any writing on the label on the front of that exhibit. A. No.

Q. And at what time did you make that purchase?

A. At 7:00 p. m. the 10th day of March. [86]

Q. And immediately after making that purchase, what did you do?

A. I went to Mr. Cosgriff's office.

Q. Mr. Cosgriff is in the habit of having office hours at 7:00 p. m.?

A. Yes, many times, but I had a key for the office, too.

Q. When you got there, what did you do? Was Mr. Cosgriff there on that night?

A. I believe he was. He was staying around practically all the time while I was doing the work, but I wouldn't swear that he happened to be there at that moment; but I am sure he was.

Q. And handing you Defendant's Exhibit No. 8, I will ask you if there is anything on the label of that exhibit in your handwriting? A. No.

(Testimony of Julius Johnson.)

Q. What time was the purchase made of that bottle?

A. The same day, 10th of March, 5:05 o'clock p. m.

Q. What did you do after you made that purchase? A. Go up to the Federal Building.

Q. Was Mr. Cosgriff in his office at 5:05 that afternoon?

A. I suppose he was. If he wasn't, I made out the label myself.

Q. These labels, did you make some of these labels, or Mr. Cosgriff make them all? You testified that Mr. Cosgriff typed and you stamped.

A. He might have typed some and I might have. If he was there he might have typed. If he wasn't there I typed them. I couldn't remember who typed it. I know I typed some and he typed some. [87]

Q. Showing you Plaintiff's Exhibit 15, I will ask you if that is one of the bottles you and Mr. Cosgriff forwarded to Seattle?

A. Mr. Cosgriff forwarded it, if it was forwarded. I had nothing to do with that.

Q. In other words, you don't know anything about these bottles after you left them with Mr. Cosgriff?

A. No, after I helped seal them.

Q. You don't know whether they were forwarded to Seattle or not?

A. As far as I am concerned I couldn't testify to that.

(Testimony of Julius Johnson.)

Q. After you first made the purchase on March 9, 1939, did you immediately open the bottle and send part of it, or get it to Mr. Cosgriff and leave it in his possession?

A. No, them bottles were left intact until Mr. Cosgriff and I opened them.

Q. And on what date did you do that?

A. I believe on the 11th of March, and then again on the fifteenth of March, when we got the other five. The 15th of April, I mean. Pardon me.

Q. Mr. Johnson, when you purchased this alcohol, why did you purchase it? What was your reason?

A. My reason for purchasing it was because we had instructions they were selling for beverage purpose and they wanted me to try to make a purchase to see if it was the truth.

Q. When you purchased it was it your intention to use the same for beverage purposes?

A. No, it was my purpose to use it for evidence.

Q. Did you use any of it for drinking?

A. No. [88]

Q. Did you sell any of it? A. No.

Redirect Examination

By Mr. Brown:

Q. On that point, Mr. Johnson, who or what class were you simulating, or attempting to simulate, when you dressed as you did?

A. What?

(Testimony of Julius Johnson.)

Q. What class of persons were you simulating or attempting to simulate when you dressed in the manner you did? A. A bum.

Witness Excused. [89]

JOHN H. COSGRIFF,

called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Brown:

Q. What is your name?

A. John H. Cosgriff.

Q. Where do you live? A. Butte, Montana.

Q. What is your occupation?

A. Investigator in the Alcohol Tax Unit, United States Treasury Department, with headquarters in Butte.

Q. Stationed at Butte? A. Yes, sir.

Q. How long have you been such investigator?

A. Since February 1st, 1929.

Q. And were you such investigator continuously during the years 1938 and up to the present time in 1939? A. I was.

Q. Do you know Edgar Dehne?

A. Yes, sir.

Q. The defendant. How long have you known him? A. Since the 14th of June, 1938.

(Testimony of John H. Cosgriff.)

Q. And what has been his occupation since you have known him?

A. Manager of the United Cigar Store, 34 North Main St., Butte, Montana.

Q. And did you have a conversation with him relative to the sale of rubbing alcohol?

A. I did.

Q. Did you bring to his attention certain regulations [90] of the government concerning that sale?

A. Yes, sir.

Q. When did you first do that?

A. On the 14th of June, 1938, I entered the United Cigar Store and served Mr. Dehne with a copy of regulations 4750, pertaining to the sale of rubbing alcohol.

Q. What, if anything, did you say to him or explain to him at that time in connection with the regulations, if you recall?

A. I read the regulations to him and asked him if he understood them, and he stated that he did, and I asked him if he would be willing to cooperate with our department in restricting the sale of rubbing alcohol to the drunks and dehorners, and Mr. Dehne stated that he would cooperate.

Q. Did you have occasion to talk with him again after that about the sale of this alcohol?

A. Yes, sir.

Q. When was that?

A. January 2nd, 1939.

Q. Where did you talk with him? About it.

(Testimony of John H. Cosgriff.)

A. In the United Cigar Store, 34 North Main St., Butte, Montana.

Q. And will you relate the conversation you had at that time, using as nearly as possible the words you used and as nearly as possible the words he used; tell us what you said and what he said?

A. I entered the store in the evening, eight o'clock or eight-thirty p. m. of January 2nd, 1939, and Mr. Dehne was on shift, and I told him that I had had complaints that he was selling rubbing alcohol to bums, and that these bums were being picked up by the police and this alcohol, of the same brand, that [91] he sold was being taken from the bums' persons. Mr. Dehne stated at that time, he said: "My boss in California sends this alcohol up for me to sell, and until I hear from him to do otherwise, I shall continue to sell it." I told him at that time that he may get in serious trouble if he continued that, and he repeated what he had first told me, that they sent it up for him to sell, his boss in San Francisco, and until he heard from him, that he would sell it until he heard differently from him.

Q. Were you present at any time after that when this same matter was discussed with the defendant Dehne, either by yourself or other officers of the government in your presence?

A. I was.

Q. When? A. January 12, 1939.

Q. Who was there on that occasion?

(Testimony of John H. Cosgriff.)

A. Investigator in charge, Mr. Deneen, Special Investigator, James Murphy, of Seattle, and——

Q. And who did the talking at that time?

A. Mr. Murphy.

Q. Mr. Murphy did? A. Yes, sir.

Q. What, if anything, did you hear Mr. Dehne say with reference to that matter, or how he was going to continue the sale of alcohol? What did he say about it?

A. He told Mr. Murphy practically the same thing he told me on the 2nd of January, 1939.

Q. What was that?

A. That his boss had sent, or shipped the alcohol up from California for them to sell, and until he received orders otherwise, that he would continue to sell the alcohol. [92]

Q. Now, I will show you the Government's Exhibit 5 and ask you if you have seen that before?

A. Yes, sir, I have.

Q. And where did you first see it, Mr. Cosgriff?

A. In room 211 of this building, Federal Building, Butte, Montana, my office.

Q. And was that turned over to you?

A. Yes, sir, it was.

Q. By whom?

A. Julius Johnson, investigator for the alcohol department.

Q. I will show you Exhibit number 3 and ask you if you have seen them before?

A. Yes, sir, I have.

(Testimony of John H. Cosgriff.)

Q. And when and where did you first see it?

A. In room 211, Federal Building, Butte, Montana.

Q. And was it turned over to you?

A. Yes, sir.

Q. By whom? A. Investigator Johnson.

Q. And on what date?

A. March 11, 1939.

Q. And as to Exhibit No. 6, on what date?

A. The same date, March 11, 1939.

Q. I will show you Exhibit No. 10, and ask you if you have seen that before and who turned it over to you, if it was turned over to you?

A. Yes, sir, this was turned over to me by Investigator Johnson on April 15, 1939.

Q. Showing you Exhibit No. 4 I will ask you if you [93] have seen that before? A. Yes, sir.

Q. And who turned it over to you and where and when?

A. Investigator Julius Johnson, on March 11, 1939, at room 211 Federal Building, Butte, Montana.

Q. Showing you Exhibit 6, I will ask you if you have seen that before and when and where, and how you got it?

A. Saw this on the 11th of March, 1939, at room 211 Federal Building; given to me by Julius Johnson, Investigator.

Q. Showing you Exhibit 17, I will ask you if you saw that before?

(Testimony of John H. Cosgriff.)

A. I received this from Investigator Johnson on March 11, 1939, in room 211, Federal Building, Butte, Montana.

Q. Exhibit 8, I will ask you if you have seen that before and when and where?

A. Yes, sir, in room 211 Federal Building, Butte, Montana, March 11, 1939; delivered to me by Investigator Johnson.

Q. Exhibit 9, I will ask you if you have seen that before and when and where?

A. Yes, sir. Delivered to me by Investigator Johnson, March 11, 1939, room 211, Federal Building, Butte, Montana.

Q. Showing you Exhibit 2, I will ask you if you have seen that before, and if you have, when and where?

A. Yes, sir, March 11, 1939; delivered to me by Investigator Johnson, Room 211, Federal Building, Butte, Montana.

Q. And Exhibit No. 12, I will ask you if you have seen that before? A. Yes, sir.

Q. When and where?

A. April 15, 1939, Room 211, Federal Building, Butte, [94] Montana; delivered by Investigator Johnson.

Q. Showing you Exhibit No. 13, I will ask you if you have seen that before, and if so when and where?

A. Yes, sir. April 15, 1939, Room 211, Federal Building, Butte, Montana, delivered by Investigator Johnson.

(Testimony of John H. Cosgriff.)

Q. Now, Exhibit 14, I will ask you if you have seen that before, and if so, when and where?

A. Yes, sir, April 15, 1939, Room 211, Federal Building, Butte, Montana, delivered by Investigator Johnson.

Q. Now, will you tell me the condition of each all of the bottles when they were delivered to you by Investigator Johnson, as to whether or not they were full or partially full. A. They were full.

Q. And when delivered to you by Investigator Johnson, will you tell me whether or not there was on the tops of the bottles, or any one of them, a United States Government Strip Tax Stamp, denoting the quantity and quality of the liquor contained therein, or the alcohol?

A. There was no stamps.

Q. Have you been familiar with the place of business of defendant corporation in Butte, Montana, the United Cigar-Whelan Stores Corporation?

A. Yes, sir.

Q. Been in there on numerous occasions?

A. Yes, sir.

Q. On any occasion you have been in there, have you seen displayed on the wall or any place else a United States Government $25.00 Tax Stamp which permits the selling of liquor at retail?

A. No, sir. [95]

Q. Or any tax stamp of the government which permits the sale of liquor at wholesale?

A. No, sir.

(Testimony of John H. Cosgriff.)

Q. And have you seen any tax of any kind at all in there? A. No, sir.

Q. You say each of these bottles were full?

A. Yes, sir.

Q. There has been some portion of the contents of each removed. Now, will you tell me about the removal of that?

A. Yes, sir. In the presence of Investigator Johnson, he and I took samples from each and every bottle, labeled the same at the time. We took one at a time and labeled and sealed the top of the bottles we were to send for samples, and for seal we put wax across the top, and I put the seal of my badge, the Treasury Seal, in the soft wax on the sample bottles.

Q. The seal of your badge, what kind of badge is it?

A. It is a badge with the United States Treasury Seal on it. The scales and the mark in the center.

Q. What portion of that did you impress?

A. The small round portion, about the size of a dime.

Q. The middle portion, the seal portion there?

A. Yes, sir.

Q. What did you do with the bottles that you poured the samples out of, from each of those other bottles. What did you do with the other bottles which you poured the samples in?

A. Those were shipped to Mr. Ringstrom, in Seattle, Washington.

(Testimony of John H. Cosgriff.)

Q. By whom? [96]

A. By myself.

Q. Identified in any way? A. Yes, sir.

Q. In what way?

A. My signature is on the label of every bottle.

Q. I will show you Exhibit 15 and ask you if you have seen that before? A. Yes, sir.

Q. And when and where and under what circumstances did you receive that? What do you know about that bottle there?

A. This is Exhibit D, taken from the original bottle, Exhibit D, that is my Exhibit D that I had marked on the bottle, and I poured a portion of the original bottle into this one, sealed it, placed the label on it, and shipped this with several other samples to Mr. Ringstrom, the chemist at Seattle, Washington.

Q. Do you find any names or initials on there?

A. Yes, sir.

Q. What?

A. Investigator Julius Johnson's and my own initial.

Q. Did you place this label on there before shipping it to Mr. Ringstrom? A. I did.

Q. What have you to say as to whether or not, on each of the other samples that you sent down there that you placed a label of the information as to the contents of the bottle? A. Yes, sir.

Q. And with your own initials on it, is that it?

A. Yes, sir.

(Testimony of John H. Cosgriff.)

Q. In other words, is this a fair illustration of the method in which each of the other bottles were labeled and sealed [97] and sent down to Mr. Ringstrom? A. Yes, sir.

Q. In whose custody have these exhibits from two to fourteen, exclusive, with the exception of number 11, been?

A. They have been in my possession.

Q. And where have you kept them?

A. Room 211, Federal Building, Butte, Montana.

Q. Your office? A. Yes, sir.

Q. Have they been kept by you under lock and key? A. Yes, sir.

Q. Has any one else except yourself had access to those? A. No, sir.

Q. Mr. Cosgriff, what have you to say as to whether or not there has been any change at all made in the contents of those bottles, or any of those, or those exhibits, or any of them from the time you were given them, or at the time Mr. Johnson gave them to you, to the present time, except for the portion that was removed as you testified for the purpose of sampling?

A. There have been no changes at all.

Q. What have you to say as to whether or not the contents of the bottles now are exactly the same as they were when turned over to you, except for the portion removed? A. Yes, sir.

(Testimony of John H. Cosgriff.)

Q. Will you describe, briefly, this place of business of the United Cigar Whelan Stores Corporation have?

A. It is a small corner room on the corner of Broadway and Main Streets, Butte, Montana; a very small place, and they deal mostly in the sale of tobaccos, pipes, cigars, cigarettes, notions, and safety razors, and articles like that. [98]

Q. Can you tell us about what the length of the floor base is?

A. Well, I don't believe the room is over twenty feet long.

Q. And the width?

A. The width would be only possibly twelve feet, not over that.

Q. Is it on the ground floor, level, or above or below? A. It is on the ground floor.

Q. It is on the street level. Is that the ground floor? A. Yes, sir.

Q. Now, this alcohol has marked on the label there Wecol, or Weko. You know that do you? You have examined it and knw that?

A. Yes, sir.

Q. What place of business sold those two brands of alcohol, exclusively?

Mr. Corette: To which we object on the ground the witness is not qualified to say or to testify.

The Court: You might qualify him.

Q. Mr. Cosgriff, did you make a check of business establishments for the purpose of determining

(Testimony of John H. Cosgriff.)

what establishments in Butte, the City of Butte, sold the product Weko or Wecol? A. I did.

Q. And what business establishments did you examine or check?

A. I examined every drugstore.

Q. Every drugstore in Butte, Montana?

A. Yes, sir, and in my district.

Q. And what did you find from an examination of those [99] drugstores?

A. No other store in my district sells those two particular brands of rubbing alcohol.

Cross Examination

By Mr. Corette:

Q. I think you said, Mr. Cosgriff, that on March 11 Agent Johnson turned over to you eight bottles of alcohol, being Plaintiff's Exhibits 5, 3, 4, 10, 7, 8, 6 and 9. Is that correct?

A. Well, those that he turned over to me on that date are marked with the date on them.

Q. Well, what dates did he turn alcohol over to you?

A. There were two or three separate dates alcohol was turned to me, beginning with the 9th of March and the 10th, and 15th of April.

Q. Then, it was not all turned over to you on March 11, that is the eight bottles?

A. I had the eight bottles by March 11.

Q. After each bottle was purchased, was it turned over to you, or were they all turned over at once?

(Testimony of John H. Cosgriff.)

A. As near as I can remember they were turned over as Mr. Johnson purchased them.

Q. Will you explain why this (indicating) is on this bottle and not on the others?

A. Yes, sir. The case I had this stored in was full with the samples that had been sent to the chemist, and the original bottles, and I didn't have room for this bottle, and the sample taken for it, so when I came into the office today I got a little wax off on top of my clothes and put this on today.

Q. It is still sealed, however.

A. Yes, sir. [100]

Q. This bottle of Wecol has on the back of it a label which states it was bought on March 9, 1939?

A. This one, yes.

Q. And that is Exhibit No. 4? A. Yes, sir.

Q. And in your Exhibit No. 3, a bottle of Wecol, states on the back that it was purchased on March 9, 1939? A. Yes, sir.

Q. And your plaintiff's Exhibit 5, being a bottle of Wecol, states on the back that it was purchased March 9, 1939? A. Yes, sir.

Q. Handing you, this bottle of rubbing alcohol compound, apparently being a bottle of Weko, showing on the back that it was purchased, March 9, 1939,—that is Plaintiff's Exhibit No. 2. Is that correct? A. Yes, sir.

Q. Mr. Cosgriff, did you at any time have Mr. Dehne, the defendant here, and Mr. Varco, one of his clerks, sign a statement with you?

(Testimony of John H. Cosgriff.)

A. Yes, sir, I did.

Q. What was that statement?

A. It was to the effect of the type of business they engaged in, the type of goods that they handled there——

Mr. Brown: I want to object. I think the statement would be the best evidence of its contents.

The Court: Your objection is well taken.

Q. Mr. Cosgriff, can you produce those statements which you had Mr. Dehne and Mr. Varco sign? A. I can produce a copy of it.

Mr. Brown: I have the original here, which you may [101] have (handing document).

Q. Mr. Cosgriff, I hand you Defendant's Exhibit 16, and I will ask you what that is?

A. That is a statement obtained by me from Mr. Dehne on the 23rd of March, 1939.

Q. I hand you, now, Defendants' Exhibit 17, and ask you what that is?

A. That is a statement taken by me from Cyril Varco, clerk in the United Cigar Store, on the 29th of March, 1939.

Mr. Corette: I offer in evidence Defendants' Exhibits 16 and 17.

Mr. Brown: We have no objection.

The Court: They will be admitted.

Documents marked Defendants' Exhibit 16 and Defendants' Exhibit 17, and are as follows. [102]

(Testimony of John H. Cosgriff.)

DEFENDANTS' EXHIBIT 16

STATEMENT OF EDGAR DEHNE

I, Edgar Dehne, Manager of United Cigar Store, 34 North Main Street, Butte, Montana, make the following statement of my own free will and accord after having been advised by John H. Cosgriff, Investigator, Alcohol Tax Unit, United States Treasury Department, Bureau of Internal Revenue, that I am not obliged to make any statement or answer any questions unless I so desire.

I have been manager of United Cigar Store at Butte, Montana for 12 years, that in addition to stocks of tobacco, cigarettes and merchandise, that we also sell shaving lotions, bay rum and rubbing alcohol, and that the average sales of rubbing alcohol would be about 12 cases 2 week, at 12 bottles to the case, or about 144 bottles, per week sold in the store.

I order the stock of rubbing alcohol as needed, and that I have quit selling rubbing alcohol to anyone that I think is buying it for beverage purposes, but I cannot ask people what they are going to do with the alcohol. I will not sell more than one bottle to same person within the same day, and since I have been advised about restriction of sale of rubbing alcohol, for beverage purposes, I have refused to sell to those whom I know to be repeaters, or dehorners.

Page No. 1
Initials—E. D.
Exhibit "Z", page 1

(Testimony of John H. Cosgriff.)

Page No. 2

Statement of Edgar Dehne.

That in June of 1938, Investigator John H. Cosgriff, of the Alcohol Tax Unit, United States Treasury Department, furnished me with a copy of Treasury Decision No. 4750, relating to sale of Bay Rum, Denatured alcohol, including rubbing alcohol, governing the sale of same. At that time Mr. Cosgriff explained to me that it would be a violation of Federal Laws for anyone to sell rubbing alcohol, or bay rum to persons, whom I had cause to believe were buying the alcohol for drinking purposes. Since that time, I have been particularly careful not to sell rubbing alcohol to repeaters or other persons that I believed might want it to drink.

That in January of this year, Mr. Cosgriff again entered the store, of which I am manager and told me that he had been receiving complaints that rubbing alcohol was being purchased in the store by persons who were drinking the alcohol. That I told Mr. Cosgriff at that time, I had been refusing to sell rubbing alcohol to repeaters, and suggested to him then, that my company in San Francisco be warned, that they were the ones who were sending it up here for us to sell, and that the matter should also be taken up with them there.

That I have read the foregoing consisting of two pages, have had opportunity to make corrections

(Testimony of John H. Cosgriff.)

thereon, that this is the truth to the best of my knowledge.

EDGAR DEHNE

Edgar Dehne

Witness:

JOHN H. COSGRIFF

Exhibit "Z" Page 2

DEFENDANTS' EXHIBIT 17

STATEMENT OF CYRIL VARCOE:

I, Cyril Varcoe, clerk in United Cigar Store, 34 North Main Street, Butte, Montana, County of Silverbow, make the following statement of my own free will and accord after having been advised by Investigator, John H. Cosgriff of the Alcohol Tax Unit, Treasury Department, Internal Revenue service, that I am not obliged to make any statement or answer any question unless I so desire.

I have been employed as a clerk in the United Cigar Store, Butte, Montana for the past eleven (11) years. In addition to the usual stock of merchandise, tobacco, cigars, cigarettes, we also sell shaving lotions, bay rum and rubbing alcohol. The sales of rubbing alcohol averaged about 144 pints a week up to the last two weeks and the sales have dropped to about 75 pints per week. This rubbing alcohol is shipped to the store from headquarters store in San Francisco California. We usually order a sufficient supply to last for about two weeks. During the early part of January 1939, Mr. Cosgriff

(Testimony of John H. Cosgriff.)

met me on the street, also on a subsequent occasion and mentioned to me that he had received numerous complaints that bums and derelicts were buying rubbing alcohol in the United Cigar Store, for the purpose of drinking. He cautioned me that the sale of rubbing alcohol to repeaters and *drinks* was a violation of Federal Laws and that trouble might follow if such sales were not discontinued. I told him that in the future I would refuse to sell rubbing alcohol to any person whom I believed was buying it to drink. Since that time, I have repeatedly refused to sell to any person who was drunk or whom I believed wanted it to drink. I have never sold rubbing alcohol to any repeater, by that, I mean, I would never sell rubbing alcohol to the same customer more than once in two or three days.

I have read the foregoing statement, have had an opportunity to make corrections thereon, and this is the whole truth to the best of my knowledge.

Butte, Montana,
March 23, 1939.

CYRIL VARCOE.

Cyril Varcoe

Witness.

JOHN H. COSGRIFF.

Witness.

D. E. DENNEEN.

Exhibit "Y"

Q. You took that statement on what date?

A. The 23rd of March, 1939.

Q. This is the statement you took from Mr.

(Testimony of John H. Cosgriff.)

Varco on March 23rd? A. Yes, sir.

Q. Mr. Brown asked you if there were any United States Government Strip Tax Seals or tax mark on the top of this alcohol when you received it, and I believe you said "No". Is that correct?

A. That is right.

Q. Have you ever seen any rubbing alcohol with the United States Strip Tax on the top, or any place on the bottle? [105]

Mr. Brown: Object to that as immaterial.

The Court: Sustained.

Q. Is it not a fact, Mr. Cosgriff, that Mr. Dehne and Mr. Varco told you in January, 1939, that they would cease the sale of alcohol to any one they believed to be a dehorn or one they believed was drinking it. A. Mr. Dehne didn't state that.

Q. Mr. Varco did? A. Yes, sir.

Q. But Mr. Dehne didn't? A. He didn't.

Witness Excused. [106]

JACK DOHERTY,

called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Brown:

Q. What is your name? A. Jack Doherty.

Q. Where do you reside? A. In Butte.

(Testimony of Jack Doherty.)

Q. What is your occupation?

A. Druggist.

Q. By whom are you employed now?

A. The Owsley Drug.

Q. How long have you been employed by the Owsley Drug Co.? A. About seven years.

Q. What character of merchandise or goods does the Owsley Drug Company carry in the regular course of its business?

A. The general line carried in drug stores, drugs and drug sundries, miscellaneous items.

Q. As a part of that do they carry rubbing alcohol? A. We do, yes, sir.

Q. Have you made a check of such records as the Owsley Drug Company has, at our request, to determine what is the approximate average, or exact, if you can, the average sale of rubbing alcohol a week by that drug company in Butte, Montana, from about the first of January, 1939 to the 15th of April, 1939?

A. I have the records from June 1st. What dates did you say?

Q. What period of time have you records?

A. From June 1st, 1938, thru August 1st, 1939.

[107]

Q. What do those records show as an average weekly sale?

A. 23 gross for five stores, over that period.

Q. Twenty-three gross?

(Testimony of Jack Doherty.)

A. Yes, approximately four and a half gross a store for ten months.

Q. How many bottles in a gross? A. 144.

Q. And you sold how many gross?

A. About four and a half gross.

Q. In four stores in Butte?

A. No, five stores. I can't tell you definitely what each store sold. We warehouse it and ship it out to the stores.

Q. Now, did you during the period from January 1st of this year to April handle a brand of rubbing alcohol known as "Weko"? A. No, sir.

Q. Or "Wecol"? A. No, sir.

Q. You say that you are manager of the Butte store? A. Of all stores, yes, sir.

Q. Can you tell me briefly, do you have any restrictions that you observe with reference to the sale of rubbing alcohol, or selling it indiscriminately to any one that asks for it?

A. No, sir. We have certain restrictions.

Q. What are they?

A. If we think they are a hop-head, or we think the person comes in might drink it, or if he is drunk, we refuse to sell it to them. [108]

Cross Examination

By Mr. Corette:

Q. Of these five stores, how many are located in Butte? A. Two.

Q. And where are they located?

(Testimony of Jack Doherty.)

A. 501 So. Main and 62 West Park.

Q. And in each of those stores your average for ten months was four and one-half gross of alcohol?

A. Yes.

Q. Or, in other words, four and a half times 144 bottles? A. That is right.

Q. Or approximately 648 bottles? A. Yes.

Q. At what price do you sell?

A. Various; the standard price is nineteen cents, twenty-five cents and thirty-nine cents.

Q. And that depends on the grade of alcohol, the different prices?

A. Well, one, the thirty-nine cent, is a different grade, yes, but depends on the label on it. One is put up under our own label; one by the manufacturer, and under their own label.

Q. During the period from January, 1939 to April, 1939, state for the jury where, in your opinion the most alcohol was purchased in Butte.

A. I really couldn't truthfully say. 62 West Park Street would use two-thirds of what the south Main St. would use.

Q. How many of these bottles a week— I take it your bottles are practically the same size as that?

[109]

A. Yes, sixteen ounces.

Q. How many bottles a week would the West Park St. Store sell?

A. It is hard to state.

Q. Well on an average?

(Testimony of Jack Doherty.)

A. Two or three dozen bottles a week.

Q. Twenty-four or thirty-six bottles a week.

A. Yes.

Q. How many people would you say you had in your store per week at West Park St.?

A. Five or six thousand.

Q. How many purchasers have you in your store each week?

A. Five, six or seven thousand.

Q. Have you any way of determining that?

A. Yes, sir.

Q. I wonder if you could obtain for the court the average of how many persons were in your store from the first of March until the 1st of May, 1939, the average for the week. Can you obtain that from your records?

A. Just from the register, the receipts.

Q. That would be the approximate ring ups?

A. Yes.

Q. You said in selling rubbing alcohol you used some discrimination? A. Yes, sir.

Q. Tell the jury when you used discrimination, based upon a man's appearance, or just what it is, whether you sell or not sell.

A. The well dressed man comes in with the smell of [110] liquor on his breath we refuse to sell. Well, if somebody comes in that is poorly dressed and seems he might drink it, we refuse to sell, or they mention a particular brand they want we refuse to sell. Otherwise a man comes in with over-

(Testimony of Jack Doherty.)

alls we sell him as quickly as a man dressed better.

Q. In other words, the dress makes no difference to your sale. A. No, sir.

Q. Can you tell the jury whether or not you sold more than one of these bottles at a time to a person in your store? A. Yes, we have.

Q. Up to how many?

A. We have sold gross at one time.

Q. And at other times have you sold less than a gross, but more than one bottle?

A. We usually had permission or notified the Federal officers of it.

Q. Have you ever sold two of these sixteen ounce bottles to a person?

A. We may have, yes. On special sales, where we had them priced low.

Q. What would you say a low price would be?

A. Nine cents, twelve or fifteen.

Q. Did you sell any for that price from January up to April 15, of 1939?

A. No, sir. I don't think we did.

Q. What was your price sale from January, 1939 to April 15, 1939?

A. Nineteen cents, twenty-five cents and thirty-nine cents. [111]

Q. But you didn't lower that price?

A. No, sir.

Mr. Corette: We would ask the court to have Mr. Doherty obtain an estimate of the number of

(Testimony of Jack Doherty.)

persons who were in his store from March 1st, 1939 to May 1st, 1939.

Mr. Brown: I think the witness has given on the stand as close an estimate as he can. He says he could only tell by the receipts on the cash register.

Mr. Corette: Well, maybe I can ask Mr. Doherty a few more questions.

Q. Mr. Doherty, how do you base your estimate of five, six or seven thousand people a week?

A. Well, I base it on the daily sales.

Q. You base it by sale or by customer?

A. By sale.

Q. How many sales a week do you believe your register tape shows? Making it sales a day?

A. Over an average say from six hundred sales a day. It would be pretty close to between seven and eight hundred.

Q. How big is this store on west Park St.?

A. I think it is approximately eighty foot frontage and one hundred to one hundred twenty feet deep.

Q. That is one hundred to one hundred twenty feet long? A. Yes.

Q. And how wide?

A. About thirty feet, I think.

Q. How many clerk do you have in there?

A. Five and sometimes six.

Q. How many days are you open?

A. Every day in the week. [112]

(Testimony of Jack Doherty.)

Q. From what hours?

A. Every day except Sundays we are open from nine to ten at night; on Sunday from twelve to ten at night.

Redirect Examination

By Mr. Brown:

Q. You told me in gross. Did you refer to pints or quarts?

A. No, sir, pints. That is the only way we buy.

Q. You spoke in cross examination about selling in quantities at times. Under what circumstances is that, and to whom?

A. Well, Barnum & Baily Circus called for a price of gross.

Q. And that is what you had in mind, some business establishment, when you sell in quantities?

A. When an individual wants a dozen, we have, in other towns, called the Internal Revenue Department and asked if it was permissible to sell.

Q. You make an investigation about the sale?

A. We follow their instructions.

Q. Now, I will ask you, do you sell, for instance, to a certain individual unknown to you, who would come in in the same day, within the space of an hour, and two or three times under those circumstances? A. No, sir. We would not sell.

(Testimony of Jack Doherty.)

Recross Examination

By Mr. Corette:

Q. Having those eight hundred customers a day, do you recognize customers; would you recognize every individual that made a purchase from you?

A. If I personally waited on them, I think I would. [113]

Q. Would your clerks?

Mr. Brown: We object.

Q. Well, how many do you wait on a day?

A. I don't wait on any.

Q. You are manager, as I understand?

A. Yes, sir.

Q. How long since you waited on any trade?

A. Two years.

Q. You said in other towns that you asked the Internal Revenue office about the sale of more than a bottle? Have you done that in Butte?

A. No, sir.

Q. Have you sold at any time more than one bottle to an individual in Butte?

A. Not that I know of, unless, as I said before, on a special sale over a week-end, may have sold two bottles to one person.

Q. You don't know of your own knowledge?

A. No.

Q. And you don't know of your own knowledge whether or not your clerks made *made* any such sales? A. No.

(Testimony of Jack Doherty.)

Q. And you don't know of your own knowledge whether your clerks sold one dozen at a time?

A. I know they had instructions not to do that.

Q. Do you know of your own knowledge whether they made such sales?

A. As far as I know they have not.

Witness Excused. [114]

ROY H. BEADLE,

called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Brown:

Q. What is your name? A. Roy H. Beadle.

Q. Where do you live?

A. Butte, Montana.

Q. Do you hold any official position in the city of Butte? A. I do.

Q. What is that? A. Police officer.

Q. How long have you been such police officer in the City of Butte? A. A year and a quarter.

Q. Are you acquainted with the defendant here, Mr. Dehne? A. I am.

Q. How long have you known him?

A. I have known Mr. Dehne for some time. I was born and raised in Butte and I noticed him

(Testimony of Roy H. Beadle.)

there in the last year and a quarter, since I was stationed on the police force.

Q. During the last year and a quarter, did you notice where he was working?

A. Yes, I noticed he was working in the United Cigar Store, the corner of Broadway and Main.

Q. During your time on the police force have you had, or have your duties required you to be stationed any where in the vicinity of the United Cigar Store? [115] A. They have.

Q. Is that part of your beat, or post, or whatever you call it?

A. That is where I have been stationed, on the corner of Broadway and Main part of the time.

Q. For how long a time were you stationed there, Mr. Beadle?

A. Well, I have been stationed there on and off for the last year and a quarter. I wouldn't tell you exactly.

Q. Have you been stationed there the same shift, the same eight hours, or varying times?

A. At varying times.

Q. Now, I will ask you about the first of January of this year and up until the 15th of April, what observation, if any have you made, or what have you seen with reference to the United Cigar Store and the sale, if any, or rubbing alcohol?

Mr. Corette: To which we object on the ground and for the reason it does not tend to prove any

(Testimony of Roy H. Beadle.)

issue in the case, and it is incompetent, irrelevant and immaterial, and does not relate to any of the purchases alleged in the indictment, but merely to general purchases.

The Court: Overruled.

Mr. Corette: Exception, please.

The Court: Exception noted.

Q. What have you observed, tell us.

A. Why I have observed the traffic at the United Cigar Store, people going in and out, and I have noticed the dehorns and rubbing alcohol drunkards going into the United Cigar Store at different times in my duties on the corner.

Q. And have you noticed them coming out of the store? [116] A. Yes, I have.

Mr. Corette: The same objection, Your Honor, to this entire line of testimony.

The Court: Very well, the objection will be noted to each question.

Mr. Corette: And exception.

Q. What have you observed with reference to anything they have brought out of the store with them?

A. I have seen them bringing out rubbing alcohol, sometimes in packages, and sometimes unwrapped.

Q. Do you know the brand of rubbing alcohol that is sold there at that store? A. I do.

Q. What is that?

(Testimony of Roy H. Beadle.)

A. The Weko brand and Wecol brand.

Q. I will ask you whether or not during the time that I have referred to you have had occasion to make arrests of men that were intoxicated.

A. On December 2nd, 1938, I was called to North Main St. to pick up a man that gave the name of Bill McGorty, and on his person was a bottle of Weko rubbing alcohol.

Q. In what condition was he?

A. He was intoxicated, lying down on the street.

Q. Was that the only occasion, or do you know of your own personal knowledge of other occasions?

A. I have one I could particularly recall, where we were called to 226 East Broadway to pick up Collins Duggan, in a room in a drunken stupor, and he had two bottles of rubbing alcohol on his person.

The Court: We will strike this. These are individual [117] cases and have no bearing. There is no proof those bottles came from the defendants' store. You will pay no attention to it in deciding what your verdict will be. An exception will be noted on behalf of the government.

Mr. Brown: No, we don't ask for an exception.

Cross Examination

By Mr. Corette:

Q. Mr. Beadle, you said that you noticed dehorns and drunkards going into the United Cigar Store? A. Yes, sir.

(Testimony of Roy H. Beadle.)

Q. Do you know whether or not while they were in there they purchased alcohol?

A. Well, at different times I have seen them coming out with alcohol, yes.

Q. Do you know whether those people you saw coming out were dehorns? A. Yes, sir.

Q. How did you determine that fact?

A. I have seen them drunk.

Q. Where?

A. At different places in the City of Butte here.

Q. In the last year and a quarter?

A. Yes, sir.

Q. Did you make arrests when you saw them drunk? A. I did.

Q. Have you ever purchased any alcohol in the United Cigar Store? A. No, sir.

Q. How do you happen to know the particular brands of alcohol by name? [118]

A. You could see them in the window most any time you went by the United Cigar Store.

Q. That is where you saw them by name, was in the window? A. Yes, sir.

Q. And that is where you became accustomed to that name? A. Yes, sir.

Q. While you were standing on the corner?

A. Yes, sir.

(Testimony of Roy H. Beadle.)

Redirect Examination

By Mr. Brown:

Q. What do you mean by the term "dehorn"?

A. Common use, we put on the dehorn at the police station, is a man that will drink rubbing alcohol and denatured alcohol, or bay rum.

Witness Excused. [119]

S. O. CLINTON,

called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Brown:

Q. State your name, please.

A. S. O. Clinton.

Q. Where do you live? A. Butte.

Q. Are you in business? A. I am.

Q. And what is your business?

A. Drug business.

Mr. Corette: We will admit, to save time, that Mr. Clinton is in the drug business and has been for thirty years on North Main Street and sells rubbing alcohol.

The Court: Well let him tell us.

Q. Are you acquainted with the location of the United Cigar Store on Broadway and Main?

(Testimony of S. O. Clinton.)

A. Just acquainted with it, yes, I know where it is.

Q. You know where the location is?

A. Yes, sir.

Q. What street is your store on?

A. Main Street, North Main.

Q. And how far *nothr?*

A. 106 North Main.

Q. About how far north of this United Cigar Store?

A. We are the second north of the corner on the south side of the street.

Q. You selling rubbing alcohol, do you, in your store? A. We do. [120]

Q. Do you sell, or have you sold, either the brand Weko or Wecol? A. No, we don't.

Q. Have you, at my request, made an effort to determine your average weekly sales of rubbing alcohol, we will say from January 1st to the 15th of April of this year? A. I have.

Q. What would those average sales run?

A. I would say around a dozen and a half a week.

Q. Do you sell indiscriminately, or how do you make those sales? I mean, do you sell to any person that comes in and asks for it?

Q. Under what circumstances do you make a sale?

(Testimony of S. O. Clinton.)

A. If they look as tho they are drinking it we don't sell it.

Q. Do you sell to the same individual who comes back the same day two or three times within the space of an hour? A. No.

Cross Examination

By Mr. Corette:

Q. In determining to whom you sell, Mr. Clinton, does the type of clothes the person wears make any difference? A. Not a bit.

Q. The man in overalls gets the same courtesy the man well dressed does? A. Absolutely.

Q. Are these (indicating exhibits) pints?

A. Yes.

Q. Sixteen ounce pints?

A. Sixteen ounce pints. [121]

Q. Have you, at any time, sold more than one pint to any customer? A. Yes.

Q. Two or three or four pints?

A. Not more than two, unless it be a dozen. I have sold a dozen to a masseur.

Q. At the time you sold it did you know they were masseurs? A. Yes.

Q. About how many people go in your store each day and make a purchase?

A. I have no idea and have no way of getting at it.

Q. Could you estimate it for the jury?

(Testimony of S. O. Clinton.)

A. It would be a poor estimate.

The Court: He said he had no idea and no way of determining, so he doesn't know.

Q. How many clerks have you, Mr. Clinton?

A. One.

Q. May I inquire at what price you sell your alcohol for?

A. Twenty-five cents and thirty-nine cents.

Q. Twenty-five cents a pint? And thirty-nine cents a pint? A. Yes.

Witness Excused. [122]

ROBERT E. DUSSAULT,

called as a witness, being duly sworn, testified as follows:

Direct Examination

By Mr. Brown:

Q. What is your name?

A. Robert E. Dussault.

Q. Where do you live? A. Butte.

Q. And what is your occupation?

A. Manager of the Main Drug stores.

Q. Where is the Main Drug store?

A. Two stores, one 12 North Main, and one 100 West Park.

Q. What, generally, what character of merchandise do each of those stores carry?

(Testimony of Robert S. Dussault.)

A. Well, drugs for prescriptions and sundries and other miscellaneous items.

Q. Is a part of their stock rubbing alcohol?

A. Yes, sir.

Q. Are you acquainted with the location of this United Cigar Store at Butte, Montana?

A. Yes, sir.

Q. Do you have one of your stores on the same street that is? A. Yes.

Q. How far from it, Mr. Dussault?

A. I would say it is about seventy-five or one hundred feet away.

Q. In the same block? A. Same block, yes.

[123]

Q. Did you, at my request, determine as accurately as you could the amount of rubbing alcohol in pints that your stores would sell a week say from the first of January to the 15th of April, of this year?

A. Yes, it would be around, approximately, about five gross.

Q. Five gross each?

A. No, five gross during that period. That would be four weeks in every month. From January to April, did you say?

Q. Yes, January to April.

A. That would be almost, about five gross in sixteen weeks.

Q. Could you give that in dozens for me?

(Testimony of Robert S. Dussault.)

A. Well, approximately, I imagine it would run about two dozen or two and a half dozen a week.

Q. Now, do you sell this alcohol indiscriminately to any person that comes in and asks for it?

A. No, if the person happens to look, rather to be on the slum type we refuse it, or unshaven, or something to that effect.

Q. Do you sell, for instance, to the same individuals who come back the same day two or three times, an hour apart? A. Never.

Cross Examination

By Mr. Corette:

Q. You said you sold about five gross in a three month period, or four month period? A. Yes.

Q. That five gross would be five times 144? [124]

A. Yes.

Q. That would be 720? A. Yes.

Q. And to determine how much you sold a week you would divide 720 by sixteen, and I believe that works out to be forty-five, would that be correct?

A. That is a little high; that is just more or less approximate.

Q. Is your five gross figured correct?

A. Well, I have figures here from June, 1938 to, I think it is, August of 1939, and that was approximately a little over eight gross, and I was taking the approximate of that.

Q. How many customers do you have a day?

(Testimony of Robert S. Dussault.)

A. Approximately it would run around two hundred.

Q. You are open seven days a week?

A. Yes, sir.

Q. Fourteen hundred customers a week?

A. Yes, about fourteen hundred or a little more.

Q. There are some men on the jury here, not from Butte. I wish you would describe exactly where your store is in relation to the United Cigar.

A. The corner of Park and Main; it is approximately on the northeast side of Park and Main; it is the fourth establishment from the corner.

Q. That is, it is north of the Consolidated Ticket office, which is on Park and Main?

A. Yes, sir.

Q. Up hill? A. Yes.

Q. About the fourth store? [125] A. Yes.

Q. And the United Cigar Company is located on the corner of Broadway and Main? A. Yes.

Q. Which is catacorner from the First National Bank? A. Yes.

Q. And at what price do you sell your alcohol?

A. Well, we have one for nineteen cents, one for twenty-five cents, and one for thirty-nine cents, and one for forty-nine cents.

Q. At any time do you sell one person more than one pint at a time? A. Yes.

Q. In passing on who you shall sell to and who

(Testimony of Robert S. Dussault.)

you shall not sell, would the fact that a man wears overalls and a heavy shirt make any difference?

A. To a certain extent it does, because any body of that type we label them more as a suspect.

Q. The fact he is not well dressed? A. Yes.

Q. And would, in your opinion, put him in a position where you would think he was not a proper person to buy rubbing alcohol? A. Yes.

Redirect Examination

By Mr. Brown:

Q. Under what circumstances would you sell more than one pint?

A. We have a special one-cent sale that we sell and celebrate twice a year, and that rubbing alcohol sells two for the [126] price of one plus one cent, and that puts it in the total two bottles for say fifty-one cents; and at different times we have sold some to masseures, and that is about all.

Recross Examination

By Mr. Corette:

Q. What would you say was the cheapest you ever sold two bottles of alcohol for in the Main Street Drug store?

A. The cheapest we ever sold it is about two bottles for thirty-two cents.

Q. Do you happen to know what the price of alcohol was at the United Cigar Company?

(Testimony of Robert S. Dussault.)

A. Well, being interested more or less in competition with them, I have seen in their windows alcohol at fifteen cents, two for a quarter, and also fifteen cents straight.

Q. Fifteen cents or two bottles for twenty-five cents? A. Yes.

Witness Excused [127]

VAL M. DERANA,

called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Brown:

Q. What is your name? A. Val M. Derana.

Q. Where do you live? A. Butte.

Q. What is your occupation? A. Druggist.

Q. And where are you employed?

A. Colbert Drug.

Q. What character of merchandise do you handle?

A. We handle dual drugs and drug sundries and miscellaneous items.

Q. Where is it located?

A. The corner of Park and Main, South Main.

Q. City of Butte. A. Yes.

Q. Do you handle rubbing alcohol?

A. Yes.

(Testimony of Val M. Derana.)

Q. Have you at my request got as accurately as you could your average sales per week of rubbing alcohol and denatured alcohol from January 1 to April 15, 1939?

A. Well, I would say about a dozen and a half or two dozen a week.

Q. Do you use any precautions in selling rubbing alcohol to individuals, or simply sell to any one who comes in and asks for it?

A. No, we use precautions to the extent we will not [128] sell it to repeaters.

Q. What do you mean by repeaters?

A. If a man comes in and purchases a bottle of alcohol and I remember him, I would not sell him another bottle the same day; or, if a man comes in intoxicated, why we refuse him the sale of alcohol.

Cross Examination

By Mr. Corette:

Q. How many customers do you believe you have in your store each week?

A. Well, it will average about one hundred fifty customers a day.

Q. You are open seven days a week?

A. Yes, we are closed three hours in the afternoon on Sunday.

Q. In determining who you shall sell to, does the clothes a man has on make any difference?

A. Not a great deal.

(Testimony of Val M. Derana.)

Q. A man with overalls on gets the same consideration as the man that is well dressed?

A. If we figure he is using it in good faith.

Q. Have you at any time sold more than one bottle of alcohol at the same time to the same person? A. Yes.

Q. At what price do you sell your alcohol?

A. Ordinarily our price is nineteen cents, and fifteen cents, and then we have sales on, one cent sale, where we sell two for twenty-six cents, for the cheaper alcohol.

Q. How often do you have sales?

A. Twice a year. [129]

Q. Have you ever sold it less than that for the two bottles? A. No.

Redirect Examination

By Mr. Brown:

Q. The circumstances under which you sold more than one bottle to an individual at the same time was what?

A. That was usually masseures and doctors, where they take advantage of the price of the alcohol.

Recross Examination

By Mr. Corette:

Q. Do you know whether or not there have been sales to any body else besides masseures and doctors for over one pint of alcohol?

(Testimony of Val M. Derana.)

A. Only on the one cent sale when they have to buy two bottles at the price of one, plus one cent.

Witness Excused [130]

HUGO RINGSTROM,

called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Brown:

Q. What is your name?

A. Hugo Ringstrom.

Q. Where do you live?

A. Seattle, Washington.

Q. What is your profession? A. Chemist.

Q. And did you attend a University or college, Mr. Ringsyrom? A. Yes, sir.

Q. And what course did you graduate in?

A. In chemistry.

Q. In what university for the chemistry?

A. The University of Minnesota.

Q. What time is required to complete the course?

A. Four years, and the same thing in chemistry.

Q. How long did you stay there?

A. Five years.

Q. Did you obtain your degree? A. Yes, sir.

Q. A degree of what?

(Testimony of Hugo Ringstrom.)

A. Bachelor of science and of chemistry.

Q. When did you graduate? A. 1915.

Q. Did you practice your profession as a chemist after graduating in 1915? A. Yes, sir. [131]

Q. For what period of time have you practiced your profession as a chemist?

A. All the time, except about two years.

Q. What is your present employment, if any?

A. With the Alcohol Tax Unit of the United States Government.

Q. With your post out in Seattle?

A. Yes, sir.

Q. How long have you been employed by the alcohol Tax Unit as a chemist?

A. I have been with the Alcohol Tax Unit since it was formed, and in similar work since 1923.

Q. Now, is it part of your duties down there to analyze substances sent to you to determine whether they contain alcohol or not? A. Yes, sir.

Q. Over what territory are these substances sent in?

A. The four northwestern states and Alaska.

Q. You made many of such analysis, have you?

A. Yes, sir.

Q. I will ask you, Mr. Ringstrom, whether or not you have seen the government Exhibit 15?

A. Yes, I have.

Q. And when and where did you first see it?

(Testimony of Hugo Ringstrom.)

A. In the laboratory of the Alcohol Tax Unit in Seattle, Washington.

Q. And when?

A. I have to refer to my cards.

Q. Do you have a memorandum that you made?

A. Yes, sir. [132]

Q. Did you make it yourself? A. Yes, sir.

Q. At or near the time you received these?

A. Yes, sir.

Q. And at the time you made that memorandum, did you yourself record on the paper the facts as they were? A. Yes, sir.

Q. And you are unable to testify without the aid of that memorandum?

A. I don't remember the date.

Q. All right, give me the date.

A. March 17, 1939.

Q. Now, is it on this? A. Yes, sir.

Q. How did that come to you in Seattle, if you know? A. By express.

Q. And how was it packed?

A. It was sealed and expressed in a cardboard carton.

Q. Were there other similar articles in there, except Exhibit 15? A. Yes, sir.

Q. How many of them were there?

A. Eight in all.

Q. And they were all shipped in there, were they? A. Yes, sir.

(Testimony of Hugo Ringstrom.)

Q. Now, you will observe a white label printed on this Exhibit 15? A. Yes, sir.

Q. And were labels containing like information on the other seven? [133] A. Yes, sir.

Q. And, now, with reference to—I see a seal at the top there. Who put that on there if you know?

A. I did.

Q. Was there on Exhibit 15 and on the other seven that were with it one of those sealing wax seals on the top?

A. There was a sealing wax sealed on there.

Q. Describe that.

A. It was a wax of the same color and standard, as far as I could tell, the same as this. The impression there was the insignia of the Treasury Department.

Q. On the seal that came to you?

A. Yes, sir.

Q. Had the seal on that Exhibit 15, that wax seal, been broken? A. No, sir.

Q. Or on the other seven that came to you?

A. No, sir, it was not.

Q. Did you break the seal? A. Yes, sir.

Q. For what purpose?

A. To analyze the contents.

Q. Did you analyze the contents of Exhibit 15?

A. Yes, sir.

Q. And of the other exhibits? A. Yes, sir.

Q. And what did you find Exhibit 15 to be?

(Testimony of Hugo Ringstrom.)

A. Rubbing alcohol.

Q. Did you find that it contained alcohol?

A. Yes, sir. [134]

Q. And how much by volume, Mr. Ringstrom?

A. The apparent proof 147.6.

Q. What have you to say as to the contents of each of the eight bottles sent to you? What did you find them to be?

A. They common rubbing alcohol.

Q. And the proof of them varied from what, the apparent proof?

A. Those eight, the apparent proof varied from 147.6 to 148.8.

Q. And could that alcohol you received be drank and consumed internally? A. Yes, sir.

Mr. Brown: If the court please, we offer now in evidence the Government's Exhibits numbered two to fourteen, both inclusive, with the exception of number eleven.

Mr. Corette: To which we object on the grounds and for the reasons that it is incompetent, irrelevant and immaterial; that there is no showing that the alcohol remained in the possession of the persons who have testified at all times. That the witness on the stand testified he received eight pints or eight samples of alcohol in small bottles, whereas the two previous witnesses, namely Julius Johnson and John Gosgriff testified that they mailed to the wit-

(Testimony of Hugo Ringstrom.)

ness on the stand or to his laboratory samples from twelve bottles of alcohol. And for the further reasons that the introduction of this evidence will not tend to prove or disprove any fact at issue in this case.

The Court: The objection will be overruled so far as Exhibits two to nine, both inclusive are concerned. As to exhibits ten to thirteen it will be sustained,—the exhibits said to be purchased on April 13th. The witness said he received eight [135] bottles in March.

Mr. Corette: May we have an exception to the part denied?

The Court: The exception will be noted.

(Objects marked Plaintiff's Exhibits 2, 3, 4, 5, 6, 7, 8 and 9.)

Q. Mr. Ringstrom, as to Exhibit 15, when was that received?

A. This was received on March 17, 1939.

Q. Now, after you took the sample from that exhibit there, what did you do with that exhibit?

A. Kept it in my possession until October 16, 1939.

Q. Then what did you do to it?

A. At that time I sealed it in the present condition, and turned it over to our chief clerk to be shipped to Montana.

Q. You made no change in it at all?

A. No.

(Testimony of Hugo Ringstrom.)

The Court: Did you receive any samples from the Alcohol Tax Unit in Butte during the month of April, 1939? A. Yes, sir.

Mr. Brown: I have those here, and I will have to put Mr. Cosgriff on to testify as to those.

The Court: Put him on and get the situation cleared up.

Witness Excused Temporarily [136]

JOHN H. COSGRIFF,

a witness heretofore on the stand, being recalled by the plaintiff, testified as follows:

Direct Examination

By Mr. Brown:

Q. With respect to the Government's Exhibits 10, 12, 14 and 15. I will ask you to examine those and tell me whether or not a sample from each was sent to Mr. Ringstrom? A. Yes, they were.

Q. And when were they sent?

A. There were two shipments——

Q. I am asking you about these last four. Did you send them?

A. There were two different shipments.

Q. All right.

A. These that were purchased on the 15th of April, 1939 were mailed or expressed shortly afterwards.

(Testimony of John H. Cosgriff.)

The Court: Now what exhibits are those?

A. No. 14, Exhibit 10, Exhibit 13 and Exhibit 12 were expressed shortly after the 15th of April, 1939.

Q. To whom?

A. To the chemist at Seattle, Washington.

Q. Now, do you have here the exhibits that were sent down? A. Yes, sir, I have.

Q. Can you select those from the box here?

A. Yes, sir. (Witness complies.)

Q. Now, with reference to Plaintiff's Exhibit 18, I will ask you if you have seen that before?

A. Yes, sir, I have.

Q. And when and where? Tell us all about it.

[137]

A. This is a sample taken from a bottle of the rubbing alcohol.

Q. Can you tell us the bottle? Have you any identifying mark on that by which you can identify the Government's exhibit it was taken from?

A. "J-4". This is it.

Q. Government's Exhibit 18 was taken from the Government's Exhibit 14? A. Yes, sir.

Q. By yourself? A. Yes, sir.

Q. What was done with it?

A. This sample was shipped to Seattle, Washington to the United States chemist there.

Q. About when?

A. Shortly after the 15th of April, 1939.

Q. And by what method of transportation?

(Testimony of John H. Cosgriff.)

A. By the American Railway Express.

Q. How was the label that is placed on there, who placed the white label on there?

A. I did, Mr. Johnson and myself.

Q. What was done by you to insure that the contents of the bottle would remain in there while in process of transportation?

A. I placed a cork in the bottle, cut the cork in even with the top, sealed it with red sealing wax, and placed the impression of my government badge on the sealing, hot wax, and made the impression of the Treasury Seal on the top of the bottle.

Q. And addressed to whom?

A. The chemist at Washington, Mr. Ringstrom.

[138]

Q. Now, showing you Plaintiff's Exhibit 19, can you tell me from what Government exhibit that came?

A. "J-3" is the mark I placed on the bottle, Exhibit J-3.

Q. Now referring to the Government's Exhibit 13, can you tell me what the contents of 19 came from?

A. Yes, the contents of the bottle Exhibit 19 came from the bottle Exhibit 13.

Q. Now, will you just tell me when and how you sealed that and what you did with it.

A. I sealed it with red sealing wax over the top

(Testimony of John H. Cosgriff.)

of the cork and placed the impression of my badge on the hot wax.

Q. On what portion of the top and what impression did it make? A. The Treasury seal.

Q. And who did you send it to?

A. To Mr. Ringstrom, chemist at Seattle, Washington.

Q. Showing you Exhibit 20, did you put the contents of that in there? A. Yes, sir.

Q. And from what exhibit did that come?

A. "J-2".

Q. Now, referring to Government's Exhibit 12, what have you to say as to the relationship between Exhibit 12 and the proposed Exhibit 20?

A. The contents in the bottle Exhibit 20 came from the bottle Exhibit 12.

Q. And after you had placed it in the bottle, what did you do about labeling it? [139]

A. Yes, sir, I did.

Q. What did you do?

A. Placed a cork on the bottle, sealed the top of the cork with sealing wax, and placed the impression of the badge on the top of hot wax, which was the Treasury seal, and sent it to the chemist, Mr. Ringstrom, at Seattle, Washington.

Q. How soon?

A. Shortly after the 15th of April, 1939.

Q. Showing you Government Exhibit 21, will you identify the proposed exhibit, out of which the contents of that came?

(Testimony of John H. Cosgriff.)

A. This is Exhibit "J-1".

Q. How many exhibits did you send down on the 15th or after the 15th? A. I sent five.

Q. Now, you have only taken, at my request, you took four out of there? A. Yes, sir.

Q. Now, will you go and get the other out of there that you sent?

(Witness complies)

Q. Well, now, I show you Exhibit 22. Tell me who put the contents of that in the bottle?

A. I did.

Q. And where?

A. In room 211 of this building.

Q. And who put the label on? A. I did.

Q. And when?

A. On the 15th of April, 1939.

Q. Now, can you identify the Government's Exhibit [140] from which that came?

A. Yes, sir.

Q. What is it? A. Exhibit "I".

Q. Handing you Government's Exhibit 10, will you tell me what relationship is there between Exhibit 10 and Exhibit 22?

A. Exhibit 10 is the original bottle; Exhibit 22 is the bottle the sample was poured in.

Q. After you had poured the sample in there, what did you do with it?

A. Placed in a cork, sealed it with wax, placed an impression of the badge from the Treasury De-

(Testimony of John H. Cosgriff.)

partment on the hot wax, and shipped the sample to Mr. Ringstrom at Seattle.

Q. By what means of transportation?

A. Railway Express.

Q. And about when?

A. Shortly after the 15th of April, 1939.

Mr. Brown: You may cross examine.

Cross Examination

By Mr. Corette:

Q. How many bottles did Mr. Johnson turn over to you? A. Thirteen. When?

Q. I mean following April 15? A. Five.

Witness Excused. [141]

HUGO RINGSTROM,

a witness heretofore on the stand on behalf of plaintiff, being recalled, testified as follows:

Direct Examination

By Mr. Brown:

Q. Mr. Ringstrom, I show you Government's Exhibits 18, 19, 20 and 22, and I will ask you if you have seen any or all of those before?

A. I have.

Q. What do you mean?

A. I have seen all of them.

Q. When and where did you first see them?

(Testimony of Hugo Ringstrom.)

A. On April 21, 1939, in the laboratory of the Alcohol Tax Unit in Seattle, Washington.

Q. And did you make an analysis of the contents of each of those exhibits? A. Yes, sir.

Q. When they came to you in what condition were they with reference to being sealed? Or not sealed? A. They were sealed.

Q. Will you describe to us just exactly the way they were sealed when you got them?

A. Over the cork was a red sealing wax with the impression of the Treasury Department on the wax.

Q. By what method of transportation did it appear they had come to you? A. By express.

Q. Did you make an analysis of the contents of each one of those exhibits? A. Yes, sir.

Q. And what did you find it generally to be? [142]

A. Rubbing alcohol.

Q. Did you make a note of the apparent proof?

A. Yes, sir.

Q. Will you give that to us?

A. The apparent proof varied between 146.6 and 147.2 in proof.

Mr. Brown: I now offer in evidence Government's Exhibits 10, 12, 13 and 14.

Mr. Corette: To which we object. And may the objection which was made at the first time these exhibits were offered be considered repeated at this time?

(Testimony of Hugo Ringstrom.)

The Court: The objection will be overruled.

Mr. Corette: Exception, please.

The Court: The exception will be noted.

(Objects marked Plaintiff's Exhibits 10, 12, 13 and 14.)

Q. Now, Mr. Ringstrom, I want to ask you whether or not all of these exhibits which you examined denatured alcohol was used in the manufacture of those exhibits? A. Yes, sir.

Q. What do you mean by "denatured alcohol"?

A. Alcohol that is rendered unfit to be used as a beverage.

Q. Explain further how denatured alcohol is made and what it is. Is it first alcohol?

A. It is first distilled as pure grain alcohol, and then it is denatured by the distiller or the denaturer, that is authorized by the government to denature alcohol.

Q. What is the process?

A. By adding a substance that renders it unfit to be used as a beverage. [143]

Mr. Brown: I move that that be stricken as a conclusion of the witness.

Q. What is put in there?

A. For rubbing alcohol the distiller adds two substances methyl propyl ketone and methyliso butyl ketone. The denaturer adds three and a half gallons of methyl propyl ketone and half a gallon

(Testimony of Hugo Ringstrom.)

of methyliso butyl ketone alsohol to every one hundred gallons of grain alcohol.

Q. Now, you told me that it could be that rubbing alcohol and denatured alcohol could be drank, and then you further stated it was unfit for consumption, for human consumption. Do you make a distinction there by the use of those two answers?

A. Alcohol as it is denatured is for ordinary purposes considered unfit for use as a beverage, but that does not mean that it cannot be misused; that some people may drink it as a beverage.

Q. When you say "proof" as referring to alcohol by a certain proof——

A. Proof is the term used to determine the strength of alcohol or whiskey, alcohol, liquids; that the proof is twice the percentage of alcohol by volume.

Cross Examination

By Mr. Corette:

Q. How much percent is there, alcohol, in a pint of this?

A. The apparent percentages there would be about 73½ percent.

Witness Excused. [144]

Whereupon an adjournment was had until Wednesday, November 15, 1939, at 10:00 o'clock a. m., at which time the trial was resumed.

Mr. Brown: We rest, Your Honor.

Mr. Corette: If your Honor please we would like to make a motion.

(Jury retires from court room.)

Mr. Corette: Comes now the defendants, United Cigar-Whelan Stores Corporation, a corporation, and Edgar Dehne, at the close of the evidence produced in this case by the plaintiff, the United States, and at the conclusion of and close of the evidence produced by the plaintiff, The United States, and moves the court to direct a verdict in favor of the defendant, and direct the jury to find a verdict of acquittal and for the dismissal of the action upon the following grounds and for the following reasons:

1st that the indictment does not state facts sufficient to constitute an offense against the laws of the United States.

Second, that each count of said indictment fails to state facts sufficient to constitute an offense against the laws of the United States.

Third, that the government has failed to prove the matters and things charged in the indictment, and in each count thereof, beyond a reasonable doubt, or by any credible evidence.

Fourth, that there is an insufficiency of the evidence introduced by the government to prove the matters and things charged in the indictment.

Fifth, that there is an insufficiency of the evidence [145] to show that the defendants, or either of them,

were guilty of the offense or offenses charged in the indictment, or in any count thereof.

Sixth, that regulation 4750, upon which all twenty-two counts are based, states that the seller must reasonably deduce that it is the intention of the purchaser to procure the same for use for beverage purposes. That the purchaser in this case has testified in this case that it was not his intention to purchase it for beverage purposes, it being rubbing alcohol, but that he purchased the alcohol with the intention of using it as evidence, and never with the intention of drinking or selling it.

Seventh, there has been no proof that there has been a sale made of anything but rubbing alcohol; and there has been no proof that a Federal Stamp Tax or any Strip Tax, or any license is necessary for the sale of rubbing alcohol, and therefore counts number 1 and 11 to 21, inclusive, should be dismissed. Further, that the only testimony offered on behalf of the government in the analysis of alcohol was to prove that it was rubbing alcohol, and the stamp and sales tax and the United States liquor license provided for by the statutes of the United States do not cover stamp or strip tax or liquor license for the sale of rubbing alcohol.

The Court: (After remarks) The motion is denied.

Mr. Corette: May we have an exception.

The Court: And the court at this time definitely denies the motion of the defendants to dismiss

counts 1 and 11 to twenty-one, and the contention of counsel for the defendants that the law which the prosecution is based upon has been repealed, is definitely and finally overruled. [146]

Mr. Corette: May we have an exception to both rulings, Your Honor?

The Court: Your exception to each and all of these rulings will be noted. [147]

EDGAR DEHNE,

one of the defendants herein, called on behalf of defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Corette:

Q. Will you state your name?

A. Edgar Dehne.

Q. What is your occupation?

A. Clerk in the Uited Cigar Store.

Q. Where?

A. United Cigar Store, 34 North Main, Butte, Montana.

Q. Where do you live?

A. 119 West Copper Street.

Q. Are you married? A. Yes, sir.

Q. Have you any children? A. Three.

Q. How long have you lived in Butte?

A. As near as I can figure, twenty-five years.

Q. How many years have you been connected with the United Cigar Store?

A. Going on fourteen.

(Testimony of Edgar Dehne.)

Q. And in what capacity?

A. Twelve years as manager, and two years chief clerk.

Q. The twelve years as manager, has that been the last twelve years? A. Yes, sir.

Q. How many clerks are employed at that store?

A. Three.

Q. What are their names?

A. The first clerk is Cyril Varco, and the relief [148] clerk is Walfred Maenpa.

Q. Will you explain to the jury how many hours a day each one of you work?

A. Well, we work a split shift or swing shift. The store is open from seven to eleven. The man that opens in the morning at seven, he works until twelve noon. At noon the clerk comes on and works from noon to six; then the man that opened in the morning works from six at night to eleven, and it is the opposite for the clerk the next day.

Q. One opens one day and one the next?

A. One opens one day and one the next.

Q. Where does the relief clerk come in?

A. We are allowed, by law, forty-eight hours altogether, so we have to have a relief clerk working the balance of the day.

Q. Does that give you clerks any time off?

A. One day a week.

Q. And who is the relief clerk?

A. Walfred Maenpa.

(Testimony of Edgar Dehne.)

Q. And Cyril Varco is the regular clerk?

A. He is the clerk, yes, sir.

Q. Have you been in court during the entire trial? A. Yes, sir.

Q. You are the Edgar Dehne that is charged as being the defendant in this action?

A. Yes, sir.

Q. Did you hear Mr. Julius Johnson, the gentleman over here, testify? A. Yes, sir.

Q. I believe, if I am correct, that he testified that [149] on the 9th day of March, 1939, at approximately 4:25 in the afternoon, he purchased one pint of alcohol from you when you were on duty in the store, and that he was dressed in overalls, a shirt and a sweater. Do you remember making such a sale? A. I do not.

Q. He also testified that on the 9th day of March, at 5:25 p. m., or approximately that time, he purchased one pint of alcohol from you in the stores of the United Cigar Company, Broadway and Main, at Butte, and that he was dressed in overalls, rough shirt and sweater. Do you remember making that sale? A. I do not.

Q. He also testified that on the morning of March 10, at 10:20 a. m., while dressed in those same clothes, he purchased one pint of alcohol from you. Do you remember making that sale?

A. I do not.

Q. He also testified that on March 10, at 7:00 o'clock p. m., he purchased one pint of alcohol from

(Testimony of Edgar Dehne.)

you while dressed in the same clothes. Do you remember making that sale? A. I do not.

Q. Mr. Dehne, what was the selling price for your alcohol?

A. Well, when I first went to work there two for a quarter, fifteen for one, or two for a quarter. Then we had a price change come in and fifteen cents a bottle straight.

Q. I will ask you if you could tell the jury approximately how many persons came into your store on the day of March 9, 1939, if you have any records? A. Yes, sir.

Q. Those records you have have been kept in the regular course of your business? [150]

A. Yes, sir.

Q. And they are true and accurate records?

A. Yes, sir.

What date?

Q. March 9, 1939. In your records do you keep a list of the number of customers, or is it determined from sales?

A. We have a customer counter on the register, and it registers every sale that is made.

Q. And on March 9, 1939, how many customers?

A. Four hundred forty-two customers.

Q. And on March 10?

A. March 10, four hundred eighty-eight.

Q. And during the week, starting with March 1st, from March 1st to March 7, how many customers did you have during that week?

(Testimony of Edgar Dehne.)

A. March 1st to 7, three thousand two hundred sixty-eight customers.

Q. And during the second week, from March 7 to March 14, how many customers did you have?

A. We had three thousand one hundred nineteen.

Q. For the two weeks, how many customers?

A. The total for the two weeks, six thousand, three hundred eighty-seven.

Q. Mr. Dehne, can you tell the jury how many persons in your opinion come into your store daily that do not buy anything? In other words, that do not become customers, and would not be shown on your records?

A. I would say about two hundred.

Q. About two hundred? A. Yes, sir.

[151]

Q. Calling your attention to April 15, 1939, will you tell the jury how many customers you had in your store on that date? You may refer to your records. A. Five hundred sixty-nine.

Q. And during that entire week of April 15. But start with April 1st to April 7, how many customers did you have in your store?

A. From April 1st to April 14, that is two weeks, totalled here six thousand eight hundred ninety-six.

Q. I didn't hear that figure.

A. Six thousand eight hundred ninety-six.

Q. Six thousand eight hundred ninety-six in the

(Testimony of Edgar Dehne.)

two weeks, and how many customers for the first week?

A. Three thousand five hundred seventeen.

Q. And those figures which you have given also include only the customers that have become purchasers? A. Just purchasers.

Q. And in addition you believe about two hundred people come in the store a day in addition to that?

A. Yes, that is to ask for change, or stamps, but all those are not registered on the register.

Q. At this store, the United Cigar, I believe you sold alcohol? A. Yes, sir.

Q. What kind of alcohol?

A. Two brands, Weko and Wecol.

Q. In the sale of this alcohol, will you state to the jury whether you ever sold more than one of these bottles of alcohol to a person?

A. Yes, sir, many times. [152]

Q. Will you state to the jury whether or not three Federal men called upon you during 1939?

A. Yes, sir.

Q. Do you remember approximately the date?

A. No, I am not so good on dates, but I could tell just about along the first of the year.

Q. Do you know their names?

A. Well, I know Mr. Cosgriff. He had two other men with him.

Q. The man that was in court yesterday—this gentleman (indicating)?

(Testimony of Edgar Dehne.)

A. That is Mr. Cosgriff.

Q. Do you recognize any of the other two gentlemen?

A. I believe the gentleman with the glasses on; this gentleman over here with the glasses.

Q. That is Mr. Murphy.

A. I can't tell their names.

Q. And this gentleman over here is Mr. Deneen?

A. Yes.

Q. These gentlemen called on you?

A. Yes, sir.

Q. At that time what did they say to you?

A. Well, Mr. Cosgriff introduced these two gentlemen, and he said, "Mr. Dehne, do you remember me warning you about the sale of rubbing alcohol several months ago?" And I said: "Yes, I do." And I said I would continue "to sell rubbing alcohol as long as it was sent in to me by the company. I am supposed to sell it." And then he said "Well, I continue to find that you are still selling rubbing alcohol." And I said: "Yes, and I am going to continue on selling as long as it is sent in by the company, but I have [153] cut down as best we know how in selling it to drunkards or dehorns". Mr. Cosgriff might not be aware of this fact, but I have records to prove it.

Q. Now, Mr. Dehne, was there anything else said about what you would do in the future insofar as selling alcohol was concerned?

(Testimony of Edgar Dehne.)

A. Yes, I had a conference with my other two clerks, and we decided which was the best way to curb, that is, if we could, after the warning from Mr. Cosgriff, and we decided not to sell to any body that looked like they were drinking it or we considered were dehorners.

Q. Did Mr. Cosgriff tell you there was any objection to selling rubbing alcohol to a normal person?

A. If I recall, Mr. Cosgriff said "Understand, Mr. Dehne, we cannot stop you from selling rubbing alcohol, but we can stop you selling it to dehorners."

Q. Now, did you talk to any one about how you should obey this regulation?

A. I believe I did; I consulted my attorney.

Q. What is his name?

A. Harry K. Jones.

Q. What did he tell you?

Mr. Brown: I object to that as hearsay.

The Court: Sustained.

Q. What did you ask him Mr. Dehne?

Mr. Brown: I object to that as hearsay.

The Court: Sustained.

Q. You said that you talked this matter over with your clerks. What did you instruct them, if you did?

A. Well, after we had this warning, had two warnings, [154] I think I asked "How are you

(Testimony of Edgar Dehne.)

fellows going to handle it? The way it looks to me, it is up to the individual who is selling it of how the man looks, whether he is a drunkard, or dehorner." And we all come to the conclusion the only way we could do was cut out those we thought were drinking it, or we thought were dehorners.

Q. Did you follow that practice yourself?

A. Yes, sir.

Q. Do you still sell rubbing alcohol there?

A. No, sir.

Q. When did you stop selling it?

A. I think it was June 16th.

Q. That was done by you on your own behalf, or was it done on request of the government?

A. On my own behalf.

Q. You stated that you don't recall seeing two purchases made on March 9th, in the course of approximately an hour and a few minutes, which Mr. Johnson testified he made, and that also on the following day you don't recall the two purchases made in the course of about nine hours?

A. That is right.

Q. I will ask you to tell the jury whether or not you recall every customer that comes into the store to be waited on?

A. No, I don't. May I cite instances?

Q. No, just answer the questions. Do you recall the same man if he comes back two or three times a day?

(Testimony of Edgar Dehne.)

A. Not always; sometimes I do and sometimes I do not.

Q. That depends upon what?

A. Depends on how busy I am for one thing. Generally that is the big important reason. [155]

Q. Is there just one clerk on at a time, Mr. Dehne? A. Yes, sir.

Q. Mr. Dehne, have you, at my request, examined your records of the sales of alcohol at the United Cigar Store at Butte, Montana to determine whether or not there was any decrease in the sale of alcohol following January, 1929, over a period before that? A. I have.

Q. Tell the jury what you found from searching your records.

A. I found from January 1st. 1939, up to the time of the indictment that the alcohol sales were cut in my store seventy-five per cent.

Q. Over the previous time? A. Yes, sir.

Q. That was at the time you were warned?

A. Yes, sir.

Q. By these three gentlemen?

A. Yes, sir.

Cross Examination

By Mr. Brown

Q. You say you find since the 1st of January that your alcohol sales were cut seventy-five percent, Mr. Dehne? A. Yes, sir.

(Testimony of Edgar Dehne.)

Q. Now, is it not a fact that on the 5th of January of this year there was shipped to you by the corporate defendant from San Francisco, four hundred eighty pint bottles of rubbing alcohol?

A. That is right.

Q. And on January 17 of 1939, twelve days after that [156] there was again a shipment to you from the corporate defendant herein in San Francisco another four hundred eighty bottles of rubbing alcohol?

A. That is about right, as near as I can think.

Q. And that represented a decrease of seventy-five per cent of what you had been selling prior to that time?

A. No, up to the time of the indictment, up to June 16th.

Q. I understood you to tell your counsel, Mr. Dehne, that since the first of January that your sales had decreased seventy-five percent?

A. From January 1st to the time of the indictment, I believe it was June 16, my sales have decreased seventy-five per cent.

Q. Well, then, that four hundred eighty bottles that were shipped in January, and the four hundred eighty pints that were shipped again in January two weeks later represented a decrease from what had been shipped to you before, is that it?

A. I believe I put in an order before that of more than that. I haven't got the records here with me.

(Testimony of Edgar Dehne.)

Q. You don't have the records with you?

A. No, sir.

Q. Do you recall an order on November 10th for six hundred bottles? A. In 1938?

Q. That would be in November of 1938.

A. I recall, yes, a big order like that; I believe I did, but I don't know the date I ordered it.

Q. Now, you say you stopped the sale of rubbing alcohol completely on June 16, this year?

[157]

A. Yes.

Q. Do you recall the date that you were arrested? A. No, I don't.

Q. Well, the records on the warrant shows that it was on the 20th day of June. Does that refresh your recollection so that you can tell me?

A. Yes, I was arrested by this man (indicating).

Q. Would you say that that was right, the 20th of June? A. Yes, sir.

Q. So you ceased selling the alcohol one day after the indictment was returned and about four days before you were arrested? Is that true?

A. As near as I can figure; I can't remember dates that far back now.

Q. Now, this is a small store that you have there, is it not? A. Yes, sir.

Q. Only one clerk works in there at a time?

A. Yes, sir.

(Testimony of Edgar Dehne.)

Q. Your chief articles of merchandise that you sell are tobacco and tobacco products, is that not true? A. That is the bulk of the sales.

Q. That is the bulk of the sales, cigars, cigarettes, pipe tobacco, and chewing gum, and, of course, pipes, and things to smoke? A. Yes.

Q. You don't sell drugs?

A. I don't know what would be listed as "drugs". I sell face lotions, and perfumes and shaving lotions, and bay rum [158] comes under that, and rubbing alcohol, and shaving soaps.

Q. Now, your customers are, in the great majority, men?

A. A lot of women trade, too.

Q. Would you say you have as much women trade as men? A. No, more men trade.

Q. You have considerably more men trade?

A. Yes, sir.

Q. Now, Mr. Dehne, did you have, between March and the first of May any stamp of the United States Government denoting that you or the corporate defendant had paid twenty-five dollars to permit retail liquor business to be done on the premises?

A. No, I didn't see any stamps around there.

Q. And did you yourself ever pay a tax or pay a license and receive a stamp which would permit you to conduct retail or wholesale liquor business?

A. No, sir.

(Testimony of Edgar Dehne.)

Q. And to your knowledge did the corporate defendant of which you are manager ever pay to the government any twenty-five dollars and receive therefor a retail liquor dealer's stamp permitting the corporate defendant to carry on a retail liquor business on the premises?

A. Not that I know of.

Q. No such stamp was ever displayed in the building? A. Not in my store, no, sir.

Q. Now, you say that the officers of the government talked to you about the sale of this rubbing alcohol? A. Yes, sir.

Q. Do you recall about June of 1938 Mr. Cosgriff, whom you know, came into your store and gave you the regulation [159] that had been adopted and explained to you the circumstances under which you could sell rubbing alcohol and what you could not?

A. Yes, sir. I have it right here in my pocket.

Q. May I have it?

(Witness hands counsel document.)

Mr. Brown: We offer in evidence, if the court please, Government's Exhibit 23.

Mr. Corette: No objection.

The Court: It will be admitted.

(Document marked Plaintiff's Exhibit 23, and is as follows: [160]

(Testimony of Edgar Dehne.)

PLAINTIFF'S EXHIBIT 23

(T. D. 4750)

Sales of Denatured Alcohol, Denatured Rum and Articles

Treasury Department

Office of Commissioner of Internal Revenue

Washington, D. C.

To District Supervisors and Others Concerned:

Pursuant to the authority contained in Section 13 of Title III of the National Prohibition Act (U. S. C. 1934 ed., title 27, sec. 83) and Sections 2 (6) and 4 of Title I of the Liquor Law Repeal and Enforcement Act (U. S. C. 1934 ed., Sup. II, Title 27, Secs. 151 (6) and 153, respectively) Regulations No. 3 is amended by adding thereto, immediately preceding Article 147 thereof, a new Article to be known as "Article 146-A", reading as follows:

> "Article 146-A. No person shall sell denatured alcohol, denatured rum, or any substance or preparation in the manufacture of which denatured alcohol or denatured rum is used, under circumstances from which he might reasonably deduce that it is the intention of the purchaser to produce the same for use for beverage purposes."

GUY T. HELVERING

Commissioner of Internal Revenue.

Approved: July 16, 1937

STEPHEN B. GIBBONS

Acting Secretary of the Treasury

(Testimony of Edgar Dehne.)

Q. Now, again, Mr. Dehne, about the second of January, do you recall Mr. Cosgriff coming into your store? A. I believe he did.

Q. And do you recall him telling you that he had received numerous complaints about the sale of alcohol from your store for beverage purposes, and giving you another warning?

A. He did, yes.

Q. And then again, on January 12, of 1939, or about that time, do you recall the three agents of the Government who have been here, coming in and again discussing the matter with you and giving you another warning? A. Yes, sir.

Q. And on January 2nd,—or about January 12th, your statement to them was that the corporate defendant sent this from San Francisco for you to sell, and as long as the company sent it you had to sell it. Is that right? A. Yes, sir.

Q. Was that the way you went about it?

A. I believe I told Mr. Cosgriff as long as the company sent it in here I was supposed to sell it. That is my bread and butter. [161]

Q. That is your bread and butter?

A. Yes, sir.

Q. And, of course, you work for the company?

A. Yes, sir.

Q. And they were, the companies themselves, were shipping this in to sell?

A. Yes, I ordered the stuff, tho.

Q. But they were directing you to sell it?

(Testimony of Edgar Dehne.)

A. Well, they don't tell you directly, but we have to sell everything that is sold that is on the shelf.

Q. As manager?

A. As manager that is my duty.

Q. As manager that was your duty?

A. Yes, sir.

Q. And you had to sell it if they continued on sending it in there to you?

A. Providing they give me notice that something was illegitimate to sell, or something, then I would have to quit selling it?

Q. Who gave you?

A. The company authorities.

Q. And your actions are controlled by the company authorities and not by the Internal Revenue authorities? A. Yes, sir.

Q. Now, Mr. Dehne, you stated that the week of March 1st, 1939 you had as your records show, customers in your store of three thousand two hundred sixty-eight?

A. Three thousand two hundred sixty-eight, yes, sir.

Q. And you have estimated that there were probably approximately another two hundred people came in and out of the store on each day which were not customers and which your [162] records do not show? A. Yes, sir.

Q. And there were only two men handling that amount of trade? A. That is right.

(Testimony of Edgar Dehne.)

Q. Each sale takes up some of your time, is that true? A. That is true.

Q. You were probably exceedingly busy in handling that number of people in a week?

A. At times we were are crowded yes, and we were rushed.

Q. And all you could do is hear what the articles is and give it, and take the money?

A. That is right, without recognizing the person.

Q. With that number of customers you don't have much time to make observation of any particular person?

A. No, we don't. Not when we are rushed.

Q. And your attention is centered on making the sale and not on the individual that is coming in to purchase, is that true?

A. In a way, yes, sir.

Q. Now, of course, while it is probable you don't recognize every customer that might come in, you do recognize some particular customers who were there, either being strangers or physical appearance, or outstanding attitude?

A. Well, our regular customers we could generally recognize them, but what I call transients, a man coming in and out and not in there regularly. I would not recognize him.

Q. Don't you think if you had customers that came in there by reason of some physical defect

(Testimony of Edgar Dehne.)

or some distinguishing manner of talk, and that he was just beyond the ordinary run of [163] customers, that you could recall him if he came back again in an hour?

A. I might one time, and again I would not.

Q. Now, Mr. Johnson is a large man?

A. Yes, sir.

Q. He is larger than the ordinary run of men?

A. Many large men like him come in my store.

Q. He is a little larger than the ordinary run of men? A. Yes, sir.

Q. And in addition to that he speaks with an accent?

A. I guess; maybe he does now, but it may be put on, a lot.

Q. But you know he does now?

A. The way I heard him yesterday he talked with an accent.

Q. If a man of his appearance came in the store and purchased rubbing alcohol from you at this time, and then an hour after that he came back again, don't you think you might recognize him?

A. No, sir.

Q. You don't think you would?

A. No, sir.

Redirect Examination

By Mr. Corette

Q. Mr. Dehne, of what type of people are most of your customers?

(Testimony of Edgar Dehne.)

A. Well, I would put them in the working class.

Q. And how are they dressed?

A. Well we have the big bulk of our trade is miners, that is fellows working in the mines. [164]

Q. Mr. Brown asked you about your statement to me as to the decrease in alcohol of seventy-five percent. I don't think it has been sufficiently clarified for the jury, and I will ask you again. Will you state to the jury whether or not there was a decrease in the sale of alcohol in your store from January, 1939 to June, 1939, over a period in 1938?

A. I believe there was.

Q. In other words, was there a decrease in 1939 from what you sold in 1938?

A. Yes, considerably.

Q. A considerable decrease? A. Yes.

Q. About how much?

A. I would say maybe seventy-five per cent.

Q. Now, you stated for Mr. Brown that you told Mr. Cosgriff, and that you told these three gentlemen when they came in, first, Mr. Cosgriff, I think, on January 2nd, and then the three men on January 12, that you would sell the alcohol if it was sent to you by the company. A. Yes, sir.

Q. Did you order the alcohol sent, or did they send it without order? A. I ordered it.

Q. What else did you tell these gentlemen that time, and Mr. Cosgriff, if you told them anything on January 2nd?

(Testimony of Edgar Dehne.)

A. I believe I told them we were doing the best we could, on this second warning, cutting out dehorners and drunkards.

Q. What do you mean by dehorners and drunkards?

A. My interpretation of it is a man who drinks this or who happens to be drunk and coming in the store to get it. [165]

Q. And you told these three men that you did that? A. Yes, sir.

Q. At the same time you told them you would sell it as long as it was sent to you?

A. Yes, sir.

Q. And did you do that? A. Yes, sir.

Q. Handing you Defendants' Exhibit 16, I will ask you if you recognize that? A. Yes.

Q. What is that?

A. Well, that is a paper in writing, showing——

Q. Signed by whom? A. By myself.

Q. In front of whom as a witness?

A. Mr. Cosgriff.

Q. How did it happen you signed this paper?

A. Well, he approached me and my first clerk, I think, and asked me if I would sign this paper to the effect that we were trying to decrease on some of our customers, or trying to cut down on those parties and selling it to what we considered were drunkards and dehorners.

Q. And you signed this paper?

A. Yes, sir.

(Testimony of Edgar Dehne.)

Q. And this paper is Defendants' Exhibit 16?

A. Yes, sir.

Recross Examination

By Mr. Brown

Q. Did you read it over before you signed it?

A. Hurriedly. I had to read that and wait on [166] customers at the same time.

Q. But you did read it before you signed it?

A. Yes, sir.

Q. And were the statements that you made in here true to the best of your knowledge and belief?

A. As far as I remember. I can't recall that word for word.

Q. Do you want to look over it?

A. If I read it now I can't remember how it read when I read it before.

Q. The question I am asking you, the time you read it before, did you know or believe that the things that were set out there were true?

A. Yes, sir.

Q. You were telling the truth, the paper contained the truth? A. Yes, sir.

Q. Now, Mr. Dehne, you had in this store window displays of alcohol? A. Yes, sir.

Q. Where did you get the forms for those displays? A. They are sent in by the company.

Q. And the company sends you in this diagram of displays of merchandise you should put in your window?

(Testimony of Edgar Dehne.)

A. Yes, in one window it is compulsory to put in the displays they send us, and in the other window it is up to the manager to display whatever he wants.

Q. You displayed the alcohol in the window?

A. Yes, sir.

Q. Did you display it in the compulsory window or [167] the discretionary window?

A. In both.

Q. You displayed it in both? A. Yes.

Witness excused.

Whereupon there was a recess had until Wednesday, November 15, 1939, until 2:00 o'clock p.m., at which time the trial of this case was resumed. [168]

WALFRED MAENPA,

called as a witness on behalf of defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Corette

Q. Will you please state your name?

A. Walfred Maenpa.

Q. What is your occupation, Mr. Maenpa?

A. Clerk.

Q. Where?

(Testimony of Walfred Maenpa.)

A. United Cigar Store, Broadway and Main, Butte, Montana.

Q. Do you reside in Butte? A. Yes, sir.

Q. What is your residence?

A. 114 South Dakota.

Q. How long have you been a resident of Butte, Mr. Maenpa? A. Thirty-nine years.

Q. How long have you been employed at the United Cigar Store? A. Four years.

Q. In what capacity? A. Clerk.

Q. Do you work every day?

A. I work two days a week.

Q. As relief clerk?

A. A relief clerk, yes.

Q. Mr. Maenpa, I don't believe you have been in court during all the case, or have you?

A. No, sir. [169]

Mr. Corette: Mr. Johnson, would you stand up?

(Gentleman in audience arises.)

Q. Mr. Maenpa, were you employed by the United Cigar Store April 15, 1939?

A. Yes, sir.

Q. Did you work on that day?

A. Yes, sir.

Q. This gentleman (Mr. Johnson) testified that at about 9:15 a.m. on April 15, 1939, he went into the United Cigar Store at the corner of Broadway and Main, Butte, Montana, dressed in overalls, rough shirt and sweater, and purchased

(Testimony of Walfred Maenpa.)

from you one pint of rubbing alcohol, and at that time I think he stated in substance that he liked to drink it. Do you remember making such sale, or do you remember such person? A. No.

Q. Do you remember seeing this gentleman?

A. No.

Q. On April 15, the same date, at 10:15 a.m., this same gentleman, dressed in the same clothes, overalls, shirt and sweater, testified that he came into the store and purchased from you at that time four pints of rubbing alcohol, and that at that time he said in substance that the other hadn't lasted long; that four of them drank it. Do you remember making such a sale? A. No, sir.

Q. Do you remember this man coming in the store on that day at all? A. No, sir.

Q. At what price was rubbing alcohol sold in the United Cigar Store?

A. Fifteen cents a bottle. [170]

Q. Was it ever sold at any other price?

A. Yes, two for a quarter.

Q. Who is your employer; who employs you?

A. United Cigar.

Q. United Cigar Store and under whom do you work? A. Under Ed Dehne.

Q. That is Edgar Dehne sitting here?

A. Yes, sir.

Q. Did he ever give you any instructions as to selling alcohol? A. Yes, sir.

(Testimony of Walfred Maenpa.)

Q. What were those instructions?

A. Well, he said not to sell it to anybody that was intoxicated when he came in the store if we thought he drank it.

Q. Did he say anything else about it?

A. Well, he had been warned not to sell it to anybody who drinks it, and we talked it over to see what we would do about it.

Q. Did you follow that practice since that time?

A. Yes, sir.

Q. Do you remember when that was?

A. No, sir.

Q. Since that warning have you ever sold it to anybody you thought drank it? A. No, sir.

Q. Have you ever refused to sell any of this alcohol? A. Yes, sir.

Q. And for what reason?

A. Well, they were intoxicated, when they came in the store. [171]

Cross Examination

By Mr. Brown

Q. What brand of alcohol do you handle there?

A. Well the last I think was by the name of Wecol.

Witness excused. [172]

J. DAMON VIGEANT,

called as a witness on behalf of defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Davenport.

Q. Please state your name.

A. J. Damon Vigeant.

Q. Where do you live?

A. 401 Colorado, Apt. 23, Butte, Montana.

Q. What is your occupation?

A. At the present time I am laboratory assistant on the W. P. A. project at the Montana School of Mines.

Q. Do you know where the United Cigar Store is located in Butte, Montana?

A. Yes, sir, on the corner of Main and Broadway.

Q. Have you ever been in there?

A. Considerably.

Q. Have you been in that store since the first of the year, 1939? A. Quite a bit.

Q. Are you in any way connected with the United Cigar Store? A. None whatever.

Q. Could you state how many times you may have been in that store since the 1st of 1939?

A. Well, practically every day up until the last three or four months, two or three times a day.

Q. How long would you stay in the store while there?

(Testimony of J. Damon Vigeant.)

A. Anywhere from five minutes to two or three hours.

Q. Are you familiar with the articles they have on sale at that store? [173] A. I am.

Q. Do you know whether or not rubbing alcohol is for sale in that store? A. Yes, I do.

Q. Have you been present in the store when a sale of rubbing alcohol was made?

A. I have.

Q. Have you ever been in the store when a person came in to purchase rubbing alcohol and the sale was refused? A. I have.

Q. Can you state whether or not you know the circumstances under which the sale of rubbing alcohol was refused?

Mr. Brown: We object to that as incompetent, irrelevant and immaterial, and not having anything to do with the present issue.

The Court: Sustained.

Q. Can you state whether or not any such sales were refused while you were present in the store in the months of March or April of this year?

A. Yes, I can.

Q. Can you state the number, or approximate number of times, when such sales were refused?

Mr. Brown: Object to the question——

Mr. Davenport: I will withdraw the question.

Q. Can you state the number of sales which were refused at that time?

(Testimony of J. Damon Vigeant.)

A. I can't; quite a number that were refused, but I can't say any definite number.

Q. You cannot approximate the number?

A. No, I would not try that, but I have seen quite [174] a number of them.

Q. Were you in the store during the months of March and April? A. Yes, sir.

Q. How frequently were you in the store?

A. Well, I couldn't say. At that time it was part time, and practically all the time between periods of work I practically used that place as a loafing stand.

Cross Examination

By Mr. Brown.

Q. You were loafing inside the place?

A. Yes, sir.

Q. It is not a large place?

A. It is not a large place.

Q. Half a dozen people get in there it is pretty well crowded? A. It is.

Q. How long have you known Mr. Dehne?

A. I knew of him previous to 1929, but I only got to know him since 1936, when I returned to Butte.

Q. You are quite friendly with him?

A. Only in the store.

Q. Well, how did he come to know about you as a witness in this case? Have you any particular friendship for him?

A. He asked me if I remembered seeing him refuse any sales, and asked if I would act as a witness for him if I was called.

Q. And you said you would?

A. I did.

Q. And talked over your testimony with him? [175]

A. No, sir.

Q. Well, you did to him?

A. Well, he asked me if I would testify about the incident of how many sales were refused, and all that.

Q. What date in March did you see them refused? A. I couldn't say.

Q. The 1st of March?

A. Well, it might have been and might have been the last. My period of work was between the 11th and 25th.

Q. But you cannot tell any date?

A. I couldn't say, I never paid any attention to it.

Q. Who were the persons in March he refused to sell to? Name them.

A. I didn't get that.

Q. Name the person or persons he refused to sell to. A. I couldn't give that either.

Q. What day in April did you see this?

A. Sometime in April, along some time during the time I wasn't working.

(Testimony of J. Damon Vigeant.)

Q. Are you particularly interested in the way he was carrying on business there?

A. No, not particularly interested.

Witness excused. [176]

CHARLEY A. DAVIES,

called as a witness on behalf of defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Davenport

Q. Will you please state your name?

A. Charley A. Davies.

Q. And where do you live?

A. I live in the Clark Block.

Q. In what city? A. City of Butte.

Q. Where are you employed?

A. Montana Power Company at the present.

Q. In what capacity?

A. You might call it bookkeeping.

Q. Are you acquainted with the location of the United Cigar Store in Butte, Montana?

A. Yes, the southeast corner of Broadway and Main.

Q. Have you ever had occasion to go in that store? A. Yes, sir.

Q. Are you acquainted with the type of merchandise handled in that store? A. Yes, sir.

(Testimony of Charley A. Davies.)

Q. Will you state whether or not rubbing alcohol is offered for sale by that store?

A. Yes, sir.

Q. Have you had occasion to go into the United Cigar Store between the first of January of this year and April 15th of this year?

A. I have been in there almost every day. I buy cigars five or ten at a time, and I go in there almost every day. [177]

Q. Have you been in there during that period of time more than once a day?

A. Sometimes, almost every time I pass.

Q. How long do you stay in the store on these occasions?

A. Might be anywhere from five minutes to thirty maybe, or an hour. Just depending on how much time I had to waste.

Q. Calling your attention particularly to the months of March and April of this year, did you, during that time, ever see one of the clerks in that store selling rubbing alcohol or making a sale of rubbing alcohol?

A. That would be hard for me to state, I couldn't state exactly the month.

Q. Could you state whether or not during that particular time you ever saw one of the clerks in that store make a refusal of a sale of alcohol?

A. I have seen them several times make a refusal of the sale of alcohol, rubbing alcohol.

(Testimony of Charley A. Davies.)

Mr. Brown: We move to strike out the testimony of the witness as not an answer to the question. He asked him during those months.

The Court: The answer will be stricken.

Q. Could you state, whether or not, during the time between January 1st and April 15th you saw one of the clerks, or any of the clerks in that store refuse to sell rubbing alcohol?

Mr. Brown: Object to that as the indictment is between March and the 15th of April.

The Court: Overruled.

A. I couldn't be positive as to dates. I won't [178] testify to any date.

Witness excused. [179]

FRANK SULLIVAN,

called as a witness on behalf of defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Corette

Q. Please state your name.

A. Frank Sullivan.

Q. What is your occupation?

A. Bookkeeper, accountant.

Q. Where are you employed at the present time?

A. Montana Welfare Board.

(Testimony of Frank Sullivan.)

Q. You live in Butte? A. Yes, sir.

Q. For how many years?

A. Forty-seven years.

Q. Are you acquainted with the location of the United Cigar Store in Butte? A. Yes, sir.

Q. Where is it? A. Broadway and Main.

Q. Do you know what products they handle?

A. They sell cigars and cigarettes and candies.

Q. State whether or not they handle rubbing alcohol? A. Yes, sir.

Q. During the month of April and during the month of March, 1939, were you ever in that store?

A. Yes, sir.

Q. About how often?

A. Approximately at least five days a week.

Q. For what purpose were you in there?

A. Sometimes to purchase something, and other times I [180] stopped to kill a little time before going to work or after coming from work.

Q. Has that been your habit over a period of time?

A. It has been for the last three or four years, last three years, I would say.

Q. During the months of March and April, 1939, were you ever present when any of the clerks refused to sell rubbing alcohol?

A. Well, I would say I have been.

A. Could you approximate the number of times?

A. No, I couldn't, nothing definitely.

(Testimony of Frank Sullivan.)

Cross Examination

By Mr. Brown.

Q. In answer to that question your answer was "Well, I would say I have been." Now why did you answer that way?

A. To what particular question?

Q. The question that Mr. Corette asked you, that is, as to whether in March and April you were present in the store and saw any of the clerks refuse to sell rubbing alcohol, and you answered in the manner I have indicated.

A. What did I say?

Q. Your answer was— You didn't say yes; you said "Well, I will say I have been". Why did you use that expression?

A. Well, because, to the best of my own knowledge I have been in there when they refused it at least once a week for every month since the first of the year.

The Court: You must answer the question. The question is confined to March and April of this year.

Mr. Brown: I move to strike that out.

The Court: It is immaterial what you saw before [181] March 1st or after April 15th.

The Witness: Well, I would say yes, I have been there.

The Court: Now, he wants to know why you didn't say "Yes" or "No"; why you did say "I would say".

(Testimony of Frank Sullivan.)

The Witness: Yes.

Q. (By Mr. Brown) I want to know why, instead of answering the question "Yes" your answer was "Well, I would say yes".

A. Well, it was just my method of answering the question.

Q. Is it not a fact that it is because you don't know whether it was any time you were in there in March or in April, and you never saw them refuse a sale to anybody?

A. No, it is not a fact.

Q. What is the fact?

A. The fact is I have seen them refuse to sell in the month of March and April.

Q. What time in March?

A. I couldn't state any particular date.

Q. What?

A. I have been there at least five days a week and didn't keep an account of the particular date when somebody was refused. It seemed to be quite a habit to turn down people when they were intoxicated.

Q. I didn't ask you about a habit. Why do you insist on volunteering answers to questions that I didn't ask you about?

Mr. Corette: Objected to as incompetent, irrelevant and immaterial, and argumentative.

The Court: Overruled. [182]

Q. Why do you insist on volunteering information here that I have not inquired of and in not answering the question I asked you?

(Testimony of Frank Sullivan.)

A. No reason at all; just merely to make my answer plain and clear about the way I want to answer it.

Q. The reason is you came up here to tell a story and you are going to tell it whether you are asked the question or not?

A. No, I did not; I came up to tell the truth.

Q. Tell me what day in March you were in there and saw this.

A. I couldn't tell a particular day.

Q. Why not?

A. Because I never took any trouble to memorize the day that I have seen those occurrences. You never do memorize a date.

Q. How do you know it was in March.

A. Well, it has been as I said——

Q. Now just answer the question and not as you said. Just answer the question. How do you know it was in March, if you didn't take the trouble to remember the date?

A. As my memory serves me, that is what it is.

Q. What?

A. As my memory serves me and to the best of my recollection.

Q. You were not asked as to the best of your recollection. You were asked to state whether you know that or not. A. I said yes.

Q. When you said "Yes", when do you mean?

A. That I could state it was in March. [183]

Q. You were in there on every day?

(Testimony of Frank Sullivan.)

A. Yes, sir.

Q. And January? A. Yes, sir.

Q. And December? A. Yes, sir.

Q. And you have been in there from then to June and July? A. Yes, sir.

Q. Were you particularly interested in the way business was being carried on in the rubbing alcohol in that store? A. No, sir.

Q. In March and April did you see them selling rubbing alcohol to people in there?

A. Yes, sir.

Q. You saw that too? A. Yes, sir.

Redirect Examination

By Mr. Corette:

Q. These people that you have testified to seeing clerks turn down for the sale of alcohol, do you know why they turned them down?

Mr. Brown: I object to that as calling for a conclusion of the witness.

The Court: You are asking for the state of another man's mind. He is not qualified to determine that. Sustained.

Q. Your testimony shows, Mr. Sullivan, that you stated that they turned down sales of alcohol to persons who were intoxicated. Do you know whether they ever turned down any other persons during the months of March and April? [184]

The Court: The question is did you see them?

Q. Did you see them turn down any other persons? A. Well, I wouldn't say to that.

Witness excused. [185]

CYRIL VARCOE,

called as a witness on behalf of defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Corette:

Q. Please state your name.

A. Cyril Varcoe.

Q. And where do you reside?

A. 1036 Iowa Avenue.

Q. How long have you lived in Butte?

A. Twenty-one years.

Q. Still residing in Butte?

A. Yes, sir.

Q. Where are you employed?

A. United Cigar Store.

Q. In what capacity? A. Clerk.

Q. In your capacity as clerk, how many years have you been employed there?

A. Going on twelve years.

Q. Prior to that time were you employed at the United Cigar Store? A. No, sir.

Q. Employed there continuously twelve years?

A. Going on twelve years, yes, sir.

Q. Do you work every day of the week?

A. No, we have one day off a week.

Q. And the other days, how do you work, how many hours?

A. A long shift one day and a short the next. I think it is ten hours one day and six the next.

[186]

Q. And the other two clerks in the store, what are their names?

(Testimony of Cyril Varcoe.)

A. Edgar Dehne and Walfred Maenpa, the relief man.

Q. Are there any others? A. No.

Q. Do two work at a time, or one?

A. Just one at a time.

Q. And the other man comes and takes his place? A. That is right.

Q. Have you ever seen this gentleman before (indicating gentleman in court room)?

A. Not to my knowledge.

Q. Were you employed in the United Cigar Store on March 9th and 10th, 1939?

A. Yes, sir.

Q. Were you employed there?

A. Yes, sir.

Q. On March 9th of this year, were you working there?

A. Unless it was my day off. I don't remember the date I was working.

Q. Have you examined the records to determine whether you were employed on March 9, 1939?

A. I believe that was one day I was working.

Q. Have you examined the records to determine whether or not you were employed on March 10, 1939?

A. Yes, I believe I looked that over and I was working.

The Court: Do you mean by "employed" actually at work?

Q. Yes, actually at work in the store? [187]

(Testimony of Cyril Varcoe.)

A. Yes, I believe the record shows I was working those two days.

Q. And you worked your full shift those two days? A. Yes, sir.

Q. This gentleman who stood up over here, has testified that on March 9th, at 7:25 p. m., he went into the United Cigar Store at the corner of Broadway and Main Streets, dressed in overalls, rough shirt and sweater, and purchased one pint of alcohol from you. Do you remember making that sale?

A. No, sir. I do not.

Q. He has also testified that on March 9th, at 8:25 p. m. he went into the United Cigar Store at the corner of Broadway and Main Streets, dressed in overalls, rough shirt, and sweater, and purchased one pint of alcohol from you. Do you remember making that sale? A. No, sir, I don't.

Q. And he has also testified that on March 10th at approximately 12:20 p. m. he went into the United Cigar Store at the corner of Broadway and Main, and was dressed in overalls, rough shirt and sweater, and purchased one pint of alcohol from you. Do you remember making that sale?

A. No, sir. I don't.

Q. He has also testified that he went into the United Cigar Store at the corner of Broadway and Main Streets, on March 10th at 5:05 p. m., or approximately that time, dressed in overalls, rough shirt, and sweater, and purchased one pint of rub-

(Testimony of Cyril Varcoe.)

bing alcohol from you. Do you remember making that sale? A. No, sir. I don't.

Q. Do you recall having a conversation with Mr. Cosgriff in the month of January of this year?

[188]

A. Yes, sir, I do.

Q. Will you relate to the jury just what that conversation was?

A. As near as I can remember,—I couldn't figure word for word, but he just told us to discontinue the sale of alcohol to fellows we were in doubt or in regards to what they were using the alcohol for.

Q. Do you remember about what time that was?

A. No, I couldn't give you the date; it was around the 1st of the year, I would say January month.

Q. You said: "told us". Who do you mean by "us"?

A. Well, told me. I beg your pardon. Scratch that out.

Q. Following that, what was your practice in the sale of alcohol? What did you do?

A. We talked it over among ourselves and decided not to sell it who we figured were using it for illegitimate purposes.

Q. Who do you mean you talked it over with?

A. The relief man, and Mr. Dehne.

Q. The relief man was who?

A. Mr. Maenpa.

(Testimony of Cyril Varcoe.)

Q. From that time on, what was your practice of selling rubbing alcohol?

A. Very limited, and to such an extent that I got the name of "cold eye" from them, and then, using a bad name along with it.

Q. During the time from January 1st, 1939, the first of the year, 1939, until about April 15, 1939, did you sell to any one that asked to purchase rubbing alcohol? [189] A. Did I sell?

Q. Did you sell to every one who asked to buy rubbing alcohol? A. No.

Q. Whom didn't you sell to?

A. I tried to discriminate between the ones using it for legitimate and those using it for illegitimate.

Q. What do you mean?

A. If they looked like they mean to drink it, or make you hesitate according to the way they acted, or a smell on the breath and a hard look in their faces, I would turn them down. If they come in sober and looked all right to me, I would sell it to them.

Q. Showing you Defendants' Exhibit 17, I will ask you if you recall what that is?

A. Yes, sir. That is the copy Mr. Cosgriff gave me in regards to alcohol and explained from then on we were to discontinue the sale of it to anybody we were in doubt of.

Q. What is this Defendants' Exhibit 17?

A. It is a statement here from then on we would curb our sale of alcohol.

(Testimony of Cyril Varcoe.)

Q. Is that your signature? A. Yes, sir.

Q. And you signed it in front of Mr. Cosgriff?

A. Yes, sir, and Mr. Denneen.

Q. Do you recognize Mr. Denneen?

A. Yes, sir.

Q. Point him out.

A. He is the gentleman back there, the gentleman with glasses and with a red necktie. [190]

Q. This statement was made by you for Mr. Cosgriff? A. That is right.

Q. What was the selling price of this alcohol?

A. Fifteen cents toward last; two for a quarter when it first came in.

Q. Do you know approximately how many customers you had in the store a day?

A. Between four and five hundred.

Q. When I use the word "customers" and you answer that many customers, do you mean purchasers or people who just come in the store?

A. That many ring-ups on the register, cash customers.

Q. How many were in the store who didn't buy anything? A. One to two hundred a day.

Q. What are these people who didn't buy anything going in your store for?

A. Asking information for different parts of town, asking for stamps, or looking for a pack of matches, or asking for the price of different stuff in the store, prices of the stuff in the window.

(Testimony of Cyril Varcoe.)

Q. Can you tell the jury, what, in your opinion, is the general type of person that patronizes the store, the average person that patronizes your store.

A. It is the average working man.

Q. By "working man" whom do you refer to?

A. The average man on the hill like the miner or the W.P.A. man; the average man with overalls and jumper and sweater.

Q. Do you also have other customers, besides that? A. Yes, sir. A lot of them. [191]

Cross Examination

By Mr. Brown:

Q. But you sell to anybody that comes in don't you? A. Yes, sir.

Q. And you say that you have more customers who are working men than people who are not working men?

A. More of the working men come in there than the better dressed men, yes, sir.

Q. Miners on the hill and other men like that?

A. That is the idea, yes, sir.

Q. Of course, there are more of those in town than anybody else, aren't there? A. Yes.

Q. Now, you said Mr. Cosgriff, that you had a talk with Mr. Cosgriff, and he gave you a warning, is that right? A. That is right.

Q. When was that?

A. Around the first of the year.

Q. And you said that after that you changed

(Testimony of Cyril Varcoe.)

your practice in the store with reference to handling rubbing alcohol? Is that right?

A. Yes, sir. We did.

Q. Well, in what respect did you change your practice?

A. Lots of customers come in where they might be drinking it, or supposed they were, or looked like they were using it for anything but legitimate purposes, we would turn them down by telling them we didn't have any in the store.

Q. Prior to that warning, the people that came in there that looked like they had been drinking it, or wanted to drink it, or were not going to use it for legitimate purposes, you would sell [192] it to them, is that true? A. Yes, sir.

Mr. Corette: We object to any testimony with reference to selling it prior to January of 1939, for the reason it is incompetent, irrelevant and immaterial, and beyond the issues of the case, beyond the period when anything can be proved, and beyond the period of March and April, as set forth in the indictment.

The Court: As I recall you introduced a statement said to have been signed by this witness.

Mr. Corette: That is correct.

The Court: In which he said that they changed their practice. Well, counsel has a right to broaden on it and carry thru. Overruled.

Q. Now, you said after that that you tried to sell, that you now tried to sell to only the people you felt used it for legitimate purposes?

(Testimony of Cyril Varcoe.)

A. Yes, sir.

Q. Now, Mr. Varcoe, if a man came in to you, bought a pint of rubbing alcohol from you, and an hour after that the same man came back and bought another pint from you, and that another hour after that the same man came back and bought another pint from you, would you consider that man was using that for a legitimate purpose and make the sale to him?

Mr. Corette: The question assumes facts not in evidence; assumes three purchases from the same clerk; no evidence being introduced as to three purchases from the same clerk, and therefore, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Corette: Exception, please. [193]

The Court: The exception will be noted.

Q. Do you have the question in mind?

(Question read)

A. Yes, sir. I would. I bought six myself in one afternoon, and I could see how that would be all right. If the gentleman came in each time sober and without anything smelling on his breath.

Q. Without asking him any questions what he wanted it for, and what he was doing with it and why he was buying alcohol of that kind, you would still make the sale?

A. Yes. I don't figure it was any of my business, if the gentleman came in dressed up.

Witness excused.

Mr. Corette: The defendants rest. I wonder if it would be understood that the motion which was made at the end of plaintiff's case could be considered made at the present time?

The Court: It will be considered as made and denied.

Mr. Corette: Exception, please.

The Court: The exception will be noted.

The foregoing is all of the testimony and evidence introduced upon trial of this cause.

Thereupon, and after argument of counsel for the respective parties, the court instructed the jury as follows, to-wit:

The Court: Gentlemen of the Jury, it now becomes my duty to charge you as to the law of the case. At the outset, I [194] wish to call your attention to the fact that you and I are both officers of this court. Each of us has a separate and distinct function to perform. It is my duty, presiding here as I do, to confine the trial of the case, within legal limits, and give you the law that controls your decision. I have nothing whatever to do with fact questions. On the other hand, you, as the other arm of the court, have nothing whatever to do with the legal phase. Your sole function, and it is an important function, is to decide the fact questions. With that I have nothing to do. That is the necessary result of the oath you took when you entered upon the trial of the case, and that oath is "that you do solemnly swear that you will well and truly try the case and a true verdict rendered according

to law, as given by the court and the evidence, so help me God." So you see, Gentlemen, that the decision is controlled by the law and the evidence, and in determining what that decision may be, you have no right to consider any sympathy that you may have for any individual involved or any one relating to or dependent upon him. It is a cold question to be decided upon two things. I can fairly say, that I have the sympathy that I believe you have for every man that comes here for trial; it is natural. In my opinion, it is not a subject of criticism, but as officers, we must lay aside our feelings as men. It is unfortunate that men will violate the law; it may be unfortunate that they are caught, but the fact remains, that if they have violated the law and are caught, the people of this country, that is, you and I, have said they shall be punished; and the people of this country said thru Congress, that is just you and I and people like us, have said that in arriving at your verdict you shall have no right to consider any human sympathy you have, but that you must decide the case [195] according to law as given by the court to you and the facts.

In the indictment in this case, twenty-two separate and distinct offenses are charged. Each of these is a separate violation of a different law, all intended for the protection of the government and the individual. In the first count it is charged that the defendants carried on the business of a retail liquor dealer without having paid the fee required by law, or retail liquor dealers' license. In counts

two to eleven, it is charged that the defendants did sell intoxicating liquor for beverage purposes. In counts twelve to twenty-one it is charged that the defendants sold denatured alcohol in containers which did not have the stamps required by law upon them. And, finally, it is charged in count twenty-two that the defendants did have in their possession, knowingly, a quantity of denatured alcohol, with intent to use it in violation of law. But this indictment is not proof of anything, and it must not be considered by you as proving or tending to prove the truth of any statement contained in it. It is merely a formal charge required by law to be filed in court for a number of purposes, first, to set the power of the court in motion; as you know, under the constitution, where a man is charged with a federal offense of the grade of offense charged here, he cannot be put on trial and the court cannot move, except on an indictment returned by at least twelve men. So, in that sense the indictment is the foundation upon which the power of the court in this case rests. The indictment is required under the law to be of a kind and character that will inform the defendant of the charge that he is called upon to meet. The constitution of the United States provides that no man shall be put upon trial in a case of this kind except upon indictment by a grand jury. It requires [196] that that indictment shall inform him of the nature of the charge made against him so that he may come here prepared to meet the issue and try his case

and defend himself against the charge made. Another purpose of the indictment is to inform the court of the facts as they are alleged, so that the court may here, taking these statements to be true, whether a Federal offense is charged in the indictment; and the final purpose of the indictment is to inform you, as jurors, of the exact questions that you are called upon to determine. So bear in mind, gentlemen, that the indictment has no weight or effect in evidence, and it must not be considered by you as in any way proving or tending to prove the truth of any statement contained in it, or that the defendant is guilty of the charges that are made. Also, bear in mind that in arriving at your verdict in this case you must not consider the fact that the defendants are here on trial as proof that they, or either of them is guilty. The fact that they are here, from the standpoint of proof, means exactly nothing.

In this case, if either defendant is guilty of any charge made in the indictment, both are guilty. The defendant corporation, is, under the proof here, liable civilly and criminally for any act that was done by the defendant Dehne, or any one acting under him while employed by defendant. So there can be no splitting of a verdict there. If the corporate defendant is guilty, that guilt arises out of and is based on the fact that the individual defendant Dehne is guilty. His act is their act. If he committed no crime, they committed none. How-

ever, in determining whether he or they did commit one or more of the offenses charged in the information here, you have a right to consider what was done by [197] each. There seems to be no controversy here upon what was done, however, all fact questions are for you, but as I recall it is admitted, that Dehne was the manager of the store here in Butte for the defendant corporation; that they shipped to him at his request the articles in evidence, and other similar articles, which all agree, or which no one appears to controvert at all, is rubbing alcohol; that the defendant Dehne, upon receipt of that alcohol, did sell it himself, and others by his direction in the place of business maintained by the defendant corporation, and of which he was manager. So, every act that he did was the act of the corporation; every act of the clerks employed by him in the establishment here was his act, and the act of the defendant company. So, as I say, both are guilty, or neither is guilty.

Turning to the first count of the indictment, the essential things charged are that beginning on or about the 9th day of March, 1939, and continuing until on or about April 15th, 1939, at 39 North Main Street, in Silver Bow County, Montana, the United Cigar-Whelan Stores Corporation, a Delaware corporation, and the defendant Dehne did carry on the business of a retail liquor dealer and willfully failed to pay the special tax imposed by law. The Federal law requires that any one carrying on the business of a retail liquor dealer, that is, who is selling in

containers of less than one gallon capacity, any intoxicating liquor for beverage purposes, that is to be drank, shall pay a license tax. The law requires that that tax shall be paid on or before a specified date each year, after the business is begun, and upon the payment of the tax the government shall deliver to the person paying a receipt showing that the tax has been paid, and that receipt or evidence of it must be posted in the place where the business is carried on in a most conspicuous place. As [198] I gather it here, there is no reasonable ground for controversy that the tax was not paid by the defendants or by the corporation or by the defendant Dehne. Neither is it contended, apparently, by Mr. Dehne, or by his corporation employer, that there was a retail liquor dealer's stamp posted any place in the location involved in these transactions or in this indictment.

This count of the indictment is based upon a regulation issued by authority of law, which provides that no person shall sell denatured alcohol—there is no question, apparently, here that the article sold, and it is admitted it was sold, is denatured alcohol—under circumstances from which it might reasonably be deduced that it is the intention of the purchaser to procure the same for use for beverage purposes.

Now, the law upon that subject is this, as soon as, or before, one can commence producing alcohol, he must go to the government and tell it under oath

that he intends to operate in that way. He must tell it, also under oath, where he intends to carry on his operation, what size stills he intends to use; between what hours he intends to carry on the distillation and so on. He is also required at that time to furnish a bond to the government to pay any taxes that may become due because of the operation that he intends to carry on. These requirements are based on certain reasons. The first reason is, that the government knowing that alcohol may or may not result in harm to mankind, is interested in having it produced under sanitary and proper conditions. In order that it may do that, it must know when, where, and by whom the operation is going to be carried on, so that these operations may be carried on under government supervision. To carry on its work in protecting humanity against unfit products, the government, of course, is required to pay [199] your money and mine. That money can only be secured by a tax on the article which is produced for sale and sold. So the government says to one who wishes to register his still that you should give a bond that you will pay the tax that will become due on the product of your distillation. Upon giving that bond, and the registering of the still, the party has a right to proceed under government supervision to carry on the process necessary to distillation of alcoholic liquors. The moment that the liquor comes into existence it is subject to a tax, which the distiller is required to pay upon its removal from the bonded warehouse where it may

be stored, or from the distillery in which it is made. And that tax and its payment is secured by the bond that the distiller gives. If that product is put upon the market for beverage purposes, it pays a tax of $2.65 a gallon. That is the tax upon it, and that tax is paid upon it when it is removed from the bonded warehouse or still for the purpose of being put in the channels of commerce. Now, that applies to all that is produced. The tax is assessed the moment it comes into being. It is due the moment that it is withdrawn from the still house, or bonded warehouse and put in the channels of commerce for use for beverage purposes. However, under the law it is not required that the tax be paid, as I say, until it is withdrawn for use for beverage purposes. While the alcohol is in the bonded warehouse, or in the still where it is produced, or stillery, the tax need not be paid; it is lying idle, and under certain conditions it may be withdrawn for certain purposes without the payment of any tax. The tax, as I told you, always fixes and continues when it is withdrawn for use for beverage purposes, and it is paid upon its withdrawal. Also, it is provided by law that one carrying on certain other enterprises may get [200] that liquor from the bonded warehouse, or the still, or the distillery, without paying any tax, provided that the distilled spirits is intended for use for mechanical business other than beverage purposes, or for use in the preparation of medicinal preparations. So, the person getting the alcohol, or the distilled spirits that is contained

in the various exhibits here, had a right to withdraw or secure the withdrawal of the alcohol contents of these bottles from the distillery or bonded warehouse without the payment of any tax at all and to use it for the preparation of denatured alcohol, which was not to be used for beverage purposes. Whether the withdrawer or the one who made the distilled spirits intended to convert it by the addition of other substances into a state known as denatured alcohol, they would still have to pay a tax required by law upon every gallon of it, if they intended to sell it for beverage purposes. No tax where it was sold, or intended for the intended use of medicine only. There is the marking point or parting point at which the tax is required to be paid and the point where it is not required to be paid. If the alcohol is withdrawn from the distillery, is denatured and is sold for use for medicinal purposes, it is subject to no tax. On the other hand, if it is withdrawn from the still, as I have told you, if withdrawn to be denatured, they are not required to pay the tax upon its withdrawal, but if they do withdraw it without paying the tax and then denature it by the addition of other substances supposed to make it unpleasant to drink, and it is only used for medical purposes, there is no tax; but, under this rule or regulation, and under the law as it is written, if it is sold under circumstances from which it might reasonably be deduced that it is the intention of the purchaser to procure the same for

use for beverage purposes, the tax immediately fixes and [201] it is the duty of the person possessing it, as well as the duty of the person selling it under those conditions to pay the government the tax that should have been paid on the liquor when it was withdrawn from the still or bonded warehouse. And, if the article, tho it be denatured alcohol, is sold under circumstances such as to cause one to reasonably deduce or to believe that it is the intention of the purchaser to use it for beverage purposes, the person who sells it, tho he is the operator of a cigar store, is, in fact, and in law, a retail liquor dealer and is required to pay the tax which Congress has said one engaged in business of that kind shall pay. So that covers the first count.

The second count, and I believe the other counts down to number eleven, inclusive, charges the sale of this denatured alcohol. There is no question it is denatured alcohol, nobody doubts it. That is an admitted fact in the case, as I understand it. The question is, was the sale of this article for beverage purposes. If it was sold for beverage purposes, it was the duty of the person selling it to pay the tax that should have been paid on it if it were withdrawn for that purpose, at the time it was taken from the bonded warehouse or still, that is as I recall it, $2.65 a gallon. If he didn't make that payment, or the tax, there was a violation of the statute of the United States. We have a little different situation with reference to all the other counts,

except the last, and that is in some ten of these counts, it is charged that the defendant did sell this liquor for beverage purposes, or under circumstances which would reasonably lead to the conclusion that the buyer intended to use it for that purpose, in containers which did not have upon them the revenue stamp required by law to be put upon liquor intended to be sold for beverage purposes. Now, there is no doubt about that. The exhibits [202] are here. There is no stamp on them. Nobody contends that there is or ever has been. The question in these counts is, were these articles sold under conditions which would cause one reasonably to deduce, or reasonably to believe, that the purchaser intended to use the article for beverage purposes. These stamps are required by law to be placed upon the container of the liquor intended to be sold for beverage purposes. Those stamps are known as strip stamps, and they are placed in such a way that the opening of the container will necessarily destroy the stamp so that it cannot be re-used. That stamp is required to contain statements denoting the quantity of the article contained in the container upon which it is affixed, and evidencing the payment of the Internal Revenue tax imposed upon the article.

I pointed out the legal steps that must be taken for the distillation of the article, all done under government supervision, under sanitary conditions, and by the use of proper materials, then, as a final

step, when the article is withdrawn to be put in the channels of commerce for use as a beverage, the law requires that the stamp shall be put upon it. The stamp is required to show two things, the quantity that the container has in it, and that the tax has been paid. It serves a double purpose: the buyer knows that he is not required to pay the tax on the article that he gets, and the buyer who gets the article also knows the quantity of the article that he is buying, that is contained in that container. That is intended for the protection of the buyer.

As I have said, the defendant would have a right to sell denatured alcohol for medicinal purposes without the payment of any tax, but, if he saw fit, that is the defendant Dehne, acting as agent of the defendant [203] company, to divert that alcohol, denatured, from the usual course that is for use for medicinal purposes, and sell it under conditions which would reasonably cause the average man to believe that the article was intended by the buyer to be used for beverage purposes, then to sell it without the strip stamp on it was a violation of the Federal law.

Finally, in the twenty-second count, it is charged that on or about the 15th day of April, 1939, at 34 North Main Street, in Butte, Montana, the defendants did knowingly possess a quantity of an article known as Wecol in the manufacture of which denatured alcohol was used, with the intention to use it in violation of a regulation issued under Title III

of the National Prohibition Act, pertaining to and forbidding the sale of articles in the manufacture of which denatured alcohol was used, under circumstances from which said defendants, and each of them, might reasonably deduce that it was the intention of the purchaser to procure the same for use for beverage purposes. In other words, the first count is based upon a failure to pay the retail liquor dealer's license tax; the next ten counts are based upon a sale of denatured alcohol for beverage purposes; the next ten counts are based upon a sale of denatured alcohol for beverage purposes in a container which was not stamped as the law requires. The twenty-second, and final count, is based upon the possession of the article with intent to sell it under circumstances which would cause one to reasonably deduce that it was the intention of the purchaser to procure the article for use for beverage purposes.

As I have told you, the indictment does not prove anything. The fact that the the defendant is on trial must not be used against him.

We now come to the burden of proof and the degree [204] of proof required before a conviction may be had in this case. By his plea of not guilty, the defendant has put the burden upon the government of proving the truth of the statements contained in this indictment. Don't misunderstand me: it is not necessary for the government to produce proof to satisfy you of the truth of each and all of

the counts set forth in the indictment before a conviction may be had. If the government's proof is sufficient, you may find the defendant guilty on all counts. If the government has failed to prove, to the degree of certainty required by law, the existence or the truth of the statements contained in any of the counts, it is your duty to find a verdict of not guilty as to all counts. On the other hand, if the government has produced here proof which satisfies your minds to the degree of certainty required by law of the truth of the statements contained in some of the counts, and has failed to prove to your satisfaction, or to that degree of proof which the laws requires the truth of the statements contained in other counts, you will find the defendant guilty of the counts which are proved, and you will find them not guilty in the counts which are not proved to your satisfaction.

In other words, you have a right to determine all the counts by one general verdict. If you believe that some of the counts have been proven and other have not, it is your duty, under your oath, to find the defendant guilty on the counts you believe have been proven, and not guilty on the counts you believe have not been proven.

With reference to proof: at the commencement of the trial the defendant comes into court, surrounded and protected by the presumption of innocence. In other words, he comes into court in the beginning presumed to be innocent. Most of us do [205] not commit criminal offenses, so the govern-

ment starts at that point, and says that when a man is charged with a public offense, it will be presumed at the outset that he is like the rest of us, he has not done anything which the law says he shall not do, but he shall be punished if he does it. This presumption of innocence has the weight and effect of evidence. It comes into court with the defendant, and it proceeds with him thru every step of the trial, and it goes with you into the jury room with you, and there it protects the defendant against a verdict of guilty unless, and until, it is overcome by proof which satisfies your minds of his guilt as charged beyond a reasonable doubt. The presumption of innocence goes with you into the jury room. You start with that presumption. You continue to find according to the presumption that the defendants are, and each of them is innocent of the offenses charged, or any of them, unless and until you are satisfied from the evidence in the case that the presumption is wrong and that the truth of the charges made in the indictment has been proven beyond a reasonable doubt. You will note I do not say "beyond all doubt". I do not say "beyond possibility of error", but I do say that the guilt of the defendant must be proven beyond a reasonable doubt. The word "reasonable doubt" is rather hard of definition. However, the law requires that I shall define it to you and try to make it clearer than the words themselves do. The Supreme Court has defined a "reasonable doubt" as a doubt which is based on reason. So, in determining whether or not the government

has borne its burden of proving its case beyond a reasonable doubt, you ask yourself "is the doubt, or is there a reason which I can state, which would cause me to believe that the defendant is innocent." The Supreme Court has also said that a reasonable doubt is a doubt which is based on reason and [206] which is reasonable in view of all; of the circumstances of the case. So, in considering whether the presumption of innocence is overcome, you consider all the facts and circumstances in the case as they appear from proof here and conditions under which the articles involved in these transactions were secured, the manner of its use after it came into the hands of defendant Dehne, as manager of the defendant corporation, retail store, at 34 North Main Street; and in that connection you take into consideration the fact, if it be a fact, that conditions were carried on in the store thru the manager. A corporation acts thru those representing it.

In determining whether or not, in view of all the evidence, it can be said that the defendant is guilty beyond a reasonable doubt, you also consider the statements, if any, made by the defendants, that is the defendant Dehne, and the defendant corporation, because every statement that he made while acting as the manager of the defendant's store in Butte is its statement. And that binds his employer and it binds him. You have a right, also, to consider any statements made by the other clerks in the store, because they were agents acting in con-

nection with the boss, and their act is the act of their employer. That is with reference to the statements that are introduced in evidence here by the defendant himself, or by the defendants themselves. Where they produce this statement, they verify the contents, they admitted the truth of every statement contained in it, tho that statement be to their disadvantage.

Now, the court proceeds further and says, that if, after an impartial comparison and consideration of all of the evidence, you can truthfully say you are not satisfied of the [207] defendants' guilt, you have a reasonable doubt. In other words, if you are not satisfied of the guilt of the defendant, you have a reasonable doubt. If, on the other hand, after such an impartial comparison and consideration of all of the evidence, you can truthfully say that you have an abiding conviction, that is a fixed belief, of the defendants' guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt. Or, we can state it in this way, that if, after an impartial view and consideration of all the facts and circumstances in the case, you have a continuing belief that the defendants are guilty of the charges made, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt. In other words, if, after considering the case fairly and impartially

and measuring the proof by the rules that I shall give you, you can fairly say that if the matter or the question was one of weight or concern to you that you would be willing to act upon the truth of the charge, you must convict. If, on the other hand, the proof is such that you cannot say that you fairly believe that you would be willing to act upon the truth of the charge as made in a matter of real weight and concern to you, you should acquit.

In deciding the issue here, we must depend in part upon the words of men. Part of the record is in writing. Statements made by the defendant Dehne, and the clerk employed by him, and his employee, is in writing in part. This fixes itself definitely; there is no moving away from it. You give the words of that writing the attention that the average would give, but there is testimony here by word of mouth. It is generally said, and as a generality it is truly said, that the jury are the [208] exclusive judges of the weight and effect of testimony. Now, as a generality, that is true. However, the law requires that I shall charge you that while you are the judges of the weight and effect of evidence, and its value, you must consider the evidence, and weigh the testimony, not arbitrarily, that is, not as you would like to weigh the evidence or the testimony, but according to the rules of law as I shall give them to you. The first of these rules, as I have said before, is that the defendant, or defendants, and each of them is presumed to be innocent, and that you must acquit them unless that

presumption is overcome by evidence which satisfies your minds of their guilt of the charges made beyond a reasonable doubt. The statute requires that in hearing the testimony you shall weigh it and in appraising the witness, you shall appraise him in subordination to the rules of evidence as given by me. Among these rules is that you are not bound to decide in conformity with the declaration of any number of witnesses which do not produce conviction in your mind against a less number or against a presumption or other evidence satisfying your mind. Which simply means, stated otherwise, that you do not find according to the number but that you do find according to the effect that the testimony given has upon you. Another of these rules is that a witness false in one part of his testimony is to be distrusted in others. So, if, after considering the testimony of a witness, you feel in the light of all the circumstances he is false in one part of it, you have a right, and should distrust his testimony on all points.

You also should consider the fact that evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side [209] to produce, and of the other to contradict; and therefore, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.

Another of the important rules by which you determine the weight and effect of evidence in deciding the case is the rule that the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact in this case. There are only two cases known to the law in which the proof of one witness who is entitled to full credit will not justify conviction, and those cases are perjury and treason. Of course, this case does not fall within those limits, and the direct evidence of one witness who is entitled to full credit, is sufficient for proof of any fact in this case. You note I do not say that the testimony of one witness is sufficient for proof of any fact, but that the testimony of one witness who is entitled to full credit. Meaning that one witness whom you believe to be telling the truth is sufficient for proof of any fact here.

Now, there was some discussion during the argument, because of divergence of opinion on the part of counsel. One counsel contending that a statement made by a government witness had been denied by those testifying on the part of the defendant. During that discussion I stated, and I state to you now in the charge, that a witness can testify to facts only which he knows of his own knowledge, that is, which are derived from his own perception, and where a witness says "I don't remember" a certain thing; that "I don't remember having sold" a certain article to a certain person, or that "I don't recall having used" certain words, he does not tes-

tify to anything that is [210] his own personal knowledge, and his testimony has no bearing on the issue here and should not be considered by you. And it cannot be considered as contradicting a statement affirmatively made by another witness. In other words, if I should say under oath that there is a mouse in that corner of the room, it is fair to assume that the mouse is there; and if one of you say to me, "I don't see it", it does not prove that it is not there. If I told you that I saw a certain fire on the street corner in a certain day and of things that occurred, and you told me of someone who was there at the time and that he did not see it, that is no proof that my statement is not true. The fact that he did not see it does not mean it didn't happen. He may have overlooked it; he may not have been in a position to see it; and he may not be in a position to recall the occurrence. Ask yourself if it is not more probable that a man who goes in to a place of business to do a certain thing should recall what was said and done at the time he was intending to do that thing than the clerk waiting on him and who waited on four or five hundred customers a day, and busy at the moment; one man has his mind intently on a certain thing; the other is not dealing with a certain purpose, he has many purposes, and, as the witness said, they are extremely busy. Ask yourselves then, if it is not more reasonable to suppose that a man who says a thing happened should be believed rather than the man who says it didn't

if that man is engaged in many occupations at the moment and his attention is not pointed to the certain thing. On that point, the law is this, that when a person denies a recollection of having taken part in a certain conversation, tho it be under oath, it is not proof, and may not be taken as tending to prove, that the conversation did not take place. Also, if a witness goes upon a witness stand [211] and says "I do not recall having done a certain thing", it is not proof that he did not do these things. It is merely proof that he does not recall it, and having no recollection he cannot speak of his own personal knowledge, and such statements are not proof in a legal sense. At the outset, in determining whether or not a witness is entitled to full credit, we start with the presumption that the witness is telling the truth. The law simply adopts the rule that a witness is presumed to speak the truth. That again is your starting point. But, this presumption of truthtelling may be overcome in any one of a number of ways known to the law, but, unless the presumption of truth telling is overcome in one of those ways, it continues and the witness is entitled to full credit. Among the ways in which the presumption of truth telling may be repelled, as the law says, or overcome as the average man would say, is, first, by the character of the testimony. There are some things that are so impossible that no man can credit them. So, in determining whether a witness is entitled to full credit, you simply ask

is it reasonably probable, or is it reasonably possible, that things could have happened as he says they did. If you find that it is within reason that his statements may be true, then the presumption of truth telling is not overcome by the nature or character of the testimony. Another of the ways in which the presumption of truthtelling may be overcome is by the appearance of the witness on the stand. In determining whether the appearance of the witness while testifying is such as to overcome the presumption of truthtelling, you merely ask yourself this: "Was his appearance on the stand such that I would not deal with him in affairs of my own." You measure him just by the rule you would measure one with whom you were dealing in business. You know what the [212] indications of falsehood are as well as I: The shifty eye, the failure to meet your eye, failure to answer directly, and things of that kind, a failure to meet you half way. If you find that the demeanor or manner of a witness on the stand is such that you would not believe him to be telling the truth, if you were dealing with him then the presumption of truthtelling is overcome, as to that witness.

Another of the ways in which the presumption of truthtelling may be overcome is by motive, if any appear from the testimony, which impels the testimony of a witness. Motive is the well-spring of human conduct. It is rarely that we do anything except for the purpose of accomplishing some ob-

ject that we wish to accomplish. So you ask yourself whether there is anything appearing in the testimony here with reference to any witness, which would cause you as reasonable men to believe that he has a sufficient interest in the result of the case to cause him to take a chance on suffering the penalties of perjury for the purpose of accomplishing some object of interest to him. If you do find that the witness has some personal object to accomplish which is of sufficient importance to cause him to testify falsely, then you have a right to say that the presumption of truth telling as to that witness is overcome by the motive. In that connection, gentlemen, you have a right to ask yourself is it reasonably likely that a man employed as a government officer would deliberately go upon the witness stand and lie for the purpose of convicting a man whom he doesn't know, and in whom he has no interest. The question is whether there is any motive on the part of the government agents which would cause them to falsify merely to convict a man whom they know to be innocent.

Another of the ways in which it may be overcome is by contradictory evidence. However, under the law, there is no [213] contradiction here of any material statement made by the government witnesses; there is no contradiction on the sale of each and every article that was introduced in evidence; there is no contradiction that the sale was made by one of the clerks in the store of the defendant cor-

poration; there is no contradiction that those sales were made at the time and place specified in the indictment; but, as I say, there has been evidence of witnesses who say "I don't know", "I can't remember," "I don't recall", but that is not proof of anything, and it is no contradiction of a direct statement made by the witness who says "I do know". So there is no contradiction on that, and the contradiction of a detail, if there be any, is not of any importance. It must be a contradiction upon a vital matter. A question material to the issue and the decision of the guilt or innocence of the defendant here.

Now, Gentlemen, as I say, it would take too much time for me to attempt to analyze for you each of these twenty-two counts. As I have said: the first count is based upon the violation of one law, the next ten counts are based upon the violation of another law. Each of those ten counts are based upon the sale of denatured alcohol for beverage purposes. The next ten counts are each and all based upon a sale in an unstamped container; and the twenty-second and final count is based upon a supposed possession of the denatured alcohol with unlawful intent.

Reverting to the first count: the burden is upon the government to show that on or about March 9, 1939, or the early part of this year, at 34 North Main Street, Butte, Montana, the defendants did sell one or more of these exhibits under circumstances which would cause one reasonably to deduce

[214] that the article was sold, or was bought, for the purpose of being drank, or drunk. Now, that is the vital thing. It is not a question of whether the man who bought it did intend to drink it; it is not a question of whether he did or not intend to sell it to another. The question is, and the vital thing is, whether the circumstances existing at the time of the sale, were such as one would reasonably deduce that the man who bought the beverage or bought the article intended drinking it. If he did, and you are satisfied that those conditions existed in that way—As I say, it is not a question of what was done or as to the fact, if it be a fact, that the article was bought for the purpose of producing it in evidence here, and not for the purpose of being drank, or drunk, is not any ground for refusing to convict on the first count. Ask yourself there, did the defendants sell—they admit they sold some articles; they don't deny they sold these specified articles under such circumstances. The question is, with reference to the first count, was the article sold, the denatured alcohol, in one of the bottles, by the defendant to the witness Johnson. If it was sold, were the conditions then such, or the circumstances such that it might reasonably be deduced from them that it was the intention of Johnson to use the article that he got, if he got one, for beverage purposes. If the circumstances were such as to lead reasonably to that deduction, and that is shown to your satisfaction beyond a reasonable doubt, then it is your duty to convict on the first count.

With reference to the next ten counts, as I said, one to eleven, both inclusive, if the sale was made by the defendants of one of these bottles put in evidence, on March 9, or thereabouts, in 1939, to the witness Johnson, and the cir- [215] cumstances surrounding the sale were such that the defendants might reasonably have deduced that it was the intention of Johnson to procure the same for beverage purposes, the defendants are guilty upon count two.

Count three, count four, count five, all relate to sales said to have been made by the defendant Dehne, or one of the clerks in the establishment, of which he was manager, to the witness Johnson. If you find that there were four sales, that each of the sales were made under circumstances from which the defendant might reasonably have deduced that it was the intention of the purchaser Johnson to procure the denatured alcohol for beverage purposes, then you should convict on counts two, three, four and five. Those are the four purchases said to have been made on March 9th. Then, we find that there are other purchases said to have been made on March 10th, four of them. Those are set out in counts six, seven, eight and nine. And it is again for you to decide, first, were the sales made on or about March 10th, by the defendant, acting thru its manager, the defendant Dehne, or one of the other clerks, at its establishment in Butte, Montana, to the witness Johnson. If you find that the sales were made and that the conditions or the cir-

cumstances then existing were such that the defendant, that is Dehne, might reasonably have deduced that it was the intention of the purchaser, Johnson, to procure the same for use for beverage purposes, then you should convict on each of those four counts. Six, seven, eight and nine, all based on transactions said to have been had on March 10th of this year.

With reference to counts ten and eleven, the indictment charges the offense set out in each of them occurred on the same day, April 15, 1939; each of them involving a supposed sale [216] of denatured alcohol. And if you find from the evidence beyond a reasonable doubt that these sales were made by one of the clerks employed in the establishment of the defendant corporation, in Butte, Montana, on or about that date, and that the conditions were then such that the person making the sale might reasonably have deduced from them that it was the intention of the purchaser to procure the article bought, denatured alcohol, for use for beverage purposes, then you should convict on counts ten and eleven.

With reference to counts twelve to twenty-one, both inclusive, they cover the same ground that is covered by counts two to eleven, both inclusive, the only difference in the charge is that the containers in which the denatured alcohol was at the time of its sale, did not have any government revenue stamps upon it as required by law. I take it

that no one will question it when I say that if the defendants here are guilty on counts two, to eleven, they are also guilty on counts twelve to twenty-one. The same elements must exist in twelve to twenty-one that exist in counts two to eleven; there must have been a sale by some one employed in the store of the defendant corporation, at Butte, Montana, on or about the date specified, of denatured alcohol to the witness Johnson; the circumstances then existing must have been such that the person making the sale might reasonably have deduced that it was the intention of the purchaser, Johnson, to procure the articles, the denatured alcohol, for use for beverage purposes; and in addition to that, in order that a conviction may be had upon counts twelve to twenty-one, it must have been shown that the containers of the articles sold under those circumstances did not have the revenue stamp on it. Now, it is fair to say, gentlemen, if the [217] defendants, are guilty of these other counts in making the sales under these conditions, it is also fair to say that you should convict upon count twenty-two. The charge is merely that the defendants did possess a quantity of denatured alcohol, intended for sale under circumstances in which the person making the sale, that is the clerk in the store of the defendant, corporation, or one of them, might reasonably deduce that it was the intention of the purchaser to procure the same for use for beverage purposes.

Now, the question of whether the circumstances

surrounding these transactions are such as to cause you, as reasonable men, to be satisfied beyond a reasonable doubt that the sales were made under circumstances which would reasonably cause one to believe that the buyer intended to use the articles for beverage purposes is entirely for you; to be determined on the evidence as it appears to you.

In conclusion, the indictment is not proof of anything, and must not be considered by you as proof of any count or element contained in it. The fact that the defendants are here on trial, charged with a Federal offense, must not be considered by you as proof, or tending to prove that they, or either of them, is guilty of any of the offenses charged. At the outset of the trial the defendant is presumed to be innocent. This presumption is binding upon you, and you must find the defendant not guilty unless and until this presumption is overcome by proof which satisfies your mind of the guilt of the defendants beyond a reasonable doubt. When you retire to your jury room, you will select one of your number foreman. That one will sign whatever verdict you return here. Twelve of your number are necessary to agree upon any verdict. Three forms of [218] verdict will be submitted to you. One of these forms is we the jury in the above entitled case finds the defendants guilty in manner and form as charged in the indictment. Which means that you are satisfied beyond a reasonable doubt that the

defendants are guilty of each offense charged in the indictment. That is a conviction on each of the twenty-two counts.

Another of the forms is we the jury in the above entitled action find the defendants not guilty. That means that you have determined, after considering all the facts in the case, that the government has not proven that the defendants are guilty upon any charge made. That covers the entire case and is an acquittal on each and all of the counts.

Another form which will be given you is, we the jury in the above entitled case find the defendants guilty in manner and form as charged in the indictment on file herein as to counts, then you have it blank, and not guilty as to counts, and then a blank. In other words, as I have told you in the beginning, you have a right to set down the conditions as you find them, and find the defendants guilty on one count and not guilty on others. If you find that the defendants are guilty as charged in some counts of the indictment, you merely fill in the number of the counts on which you believe they are guilty, and if you find that it is not proven beyond a reasonable doubt that they are guilty on other counts, why you insert after the words "not guilty as to counts" whatever they may be. In other words, that is a split verdict. If you find them guilty on some counts and not guilty on others. If you find them guilty, if you do, on all

counts, you merely return your verdict, "We, the jury find the defendants guilty in manner and form as charged." If you find the government's case is not proven as to any count, you [219] return the verdict "Not guilty". If you find the case is proven as to some counts and not as to others, you indicate by your verdict on which one you believe the government has sustained its case and insert in the last blank the number of the counts on which you feel that the government has failed to prove its case.

I note that there is a verdict here which would justify the jury in finding one of the defendants guilty without the other. As I said, the offense is based entirely on the act of Dehne.

Mr. Brown: That is right.

The Court: And as I view it, they either convict both or acquit both on the counts as they are written.

Has the government any objection or exception to the charge as given?

Mr. Brown: No.

The Court: Have the defendants, or either of them any objection or exception to the charge as given?

Mr. Corette: No, your Honor.

(Whereupon the jury retired in charge of a bailiff to consider of their verdict.) [220]

Subsequently at about 10:20 p.m. on November 15th, 1939, the jury returned into Court with their verdict, which is as follows:

[Title of Court and Cause.]

VERDICT

We, the jury in the above-entitled cause, find the defendants guilty in manner and form as charged in the indictment on file herein.

E. H. YOUNG
Foreman

[Endorsed]: Filed November 15, 1939.

That thereafter on the 20th day of November, 1939, judgment was rendered and pronounced by the Court by order duly and regularly signed, made and entered as follows:

[Title of Court and Cause.]

JUDGMENT

By an indictment, containing twenty-two counts, duly found and presented by a grand jury and filed herein on June 17, 1939, it is charged: [221]

[Note: Counts One to Twenty-two are already set forth in the Indictment (pages 2 to 29 of this printed record), so are here omitted to avoid duplication.]

On October 18, 1939, the defendants herein were called before the Court at the courtroom thereof in the City of Butte, in the State and District of Montana, for arraignment and plea, and then and there, and at his request, the name of Robert D. Corette, an attorney and counsellor at law admitted to practice at the bar of the above-entitled court, was entered of record as counsel for the parties defendant herein and each of them; thereupon said indictment was read to the defendant Edgar Dehne, in person, and to said Robert D. Corette as counsel for the United Cigar Whelan Stores Corporation, a corporation; the defendant Edgar Dehne, in person, answered that his true name is Edgar Dehne and pleaded that he is not guilty of the offenses charged, and the defendant United Cigar Whelan Stores Corporation, a corporation, speaking through its said counsel, answered that its true name is United Cigar Whelan Stores Corporation, a corporation, and pleaded that it is not guilty of the offenses charged; whereupon the Court stated that the case would be set for trial and tried at the next jury term of the court to be held at the City of Butte, in the State and District of Montana.

Thereafter the case was set for trial before the above-entitled Court at the courtroom thereof in the City of Butte, in the State and District of Montana, at the hour of Ten (10) o'clock in the morning on November 14, 1939.

At the hour of Ten (10) o'clock in the morning on November 14, 1939, the above-entitled case came duly and regularly on for trial before the above-entitled Court, at the courtroom thereof in the City of Butte, in the State and District of Montana. The United States of America was represented by the Honorable R. Lewis Brown, Assistant to the Attorney of the United States of America for the District of Montana, and the defendant Edgar Dehne was present in court in person and represented by Robert D. Corette, Esq., his attorney, and the defendant United [243] Cigar Whelan Stores Corporation, a corporation, was represented by Robert D. Corette, Esq., its attorney. Both of the defendants were also represented by Wm. A. Davenport, Esq., whose name was entered as associate counsel. A jury of twelve qualified men was duly empaneled and sworn to try the case; testimony was introduced on the part of the parties plaintiff and defendant, and the case not being concluded at the time set for adjournment further hearing of the case was continued until ten (10) o'clock in the morning on November 15, 1939, at the court room of the above-entitled court in the City of Butte, in the State and District of Montana. At the hour of Ten (10) o'clock in the morning on November 15, 1939, the trial of the case was resumed, and further testimony on the part of the parties plaintiff and defendant was introduced; whereupon, the parties plaintiff and defendant having rested, the case

was argued to the jury by the attorneys for the plaintiff and defendants, and thereupon, and at the conclusion of the arguments, the Court charged the jury as to the law of the case, and at the conclusion of the charge the jury retired for deliberation, in charge of officers duly sworn to keep them together in some private and convenient place, and not to permit any person to speak to or communicate with them, nor to do so himself unless by order of the Court or to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed or when ordered by the Court.

Thereafter, and on November 15, 1939, the jury having agreed upon a verdict, they were conducted into court by the officers having them in charge, and there, in the presence of the defendant Edgar Dehne and his counsel and counsel for the defendant United Cigar Whelan Stores Corporation, a corporation, who were then, and at all times during the trial of the case had been, present in court, their names were called by the Clerk, and all being present their foreman delivered their verdict, which, omitting the title [244] of court and cause, is in words and figures as follows, to-wit:

> "We, the jury in the above-entitled cause, find the defendants guilty in manner and form as charged in the indictment on file herein."

to the Court, the Court delivered the verdict to the Clerk, who filed the same and then read the same to the jury and asked them if the verdict as

recorded is their verdict, and all of the jury assenting thereto they were discharged, and the Court appointed the hour of Ten (10) o'clock in the morning on November 20, 1939, at the courtroom of the above-entitled court in Butte, Montana, as the time and place for pronouncing judgment.

At the hour of Ten (10) o'clock in the morning on November 20, 1939, the defendant Edgar Dehne appeared personally in court, with his counsel, for judgment, and the defendant United Cigar Whelan Stores Corporation, a corporation, was represented by Robert D. Corette, Esq., its attorney, and defendants were informed by the Court of the nature of the charges against them and of their pleas and the verdict thereon, and they were asked by the Court whether they had any legal cause to show why judgment should not be pronounced against them, and no sufficient cause being alleged or appearing to the Court why judgment should not be pronounced,

It is ordered and adjudged, and this does order and adjudge:

1: That for the offense set out in Count One of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a fine of Twenty-five Hundred ($2500.00) Dollars to the United States of America;

2: That for the offense set out in Count One of the indictment herein the defendant Edgar Dehne shall pay a fine of One Hundred ($100.00) Dollars

to the United States of America, without imprisonment for non-payment of said fine, and shall be committed to the custody of the Attorney General of the United States, or [245] his authorized representative, for confinement in a jail for the term of Thirty (30) Days:

(Secs. 3250(b)(1), 3254(c), 3253, I.R.C.)

3: That for the offense set out in Count Two of the Indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred ($200.00) Dollars to the United States of America;

4: That for the offense set out in Count Two of the indictment herein the defendant Edgar Dehne shall pay a penalty of One ($1.00) Dollar to the United States of America;

(Secs. 3109, 3111, 3115, I.R.C. and A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

5: That for the offense set out in Count Three of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred ($200.00) Dollars to the United States of America;

6: That for the offense set out in Count Three of the indictment herein the defendant Edgar Dehne shall pay a penalty of One ($1.00) Dollar to the United States of America;

(Secs. 3109, 3111, 3115, I.R.C. and A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

7: That for the offense set out in Count Four of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred ($200.00) Dollars to the United States of America;

8: That for the offense set out in Count Four of the indictment herein the defendant Edgar Dehne shall pay a penalty of One ($1.00) Dollar to the United States of America;

(Secs. 3109, 3111, 3115, I.R.C. and A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

9: That for the offense set out in Count Five of the indictment herein the defendant United Cigar Whelan Stores Corporation, [246] a corporation, shall pay a penalty of Two Hundred ($200.00) Dollars to the United States of America;

10: That for the offense set out in Count Five of the indictment herein the defendant Edgar Dehne shall pay a penalty of One ($1.00) Dollar to the United States of America;

(Secs. 3109, 3111, 3115, I.R.C. and A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

11: That for the offense set out in Count Six of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred ($200.00) Dollars to the United States of America;

12: That for the offense set out in Count Six of the indictment herein the defendant Edgar Dehne shall pay a penalty of One ($1.00) Dollar to the United States of America;

(Secs. 3109, 3111, 3115, I.R.C. and A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

13: That for the offense set out in Count Seven of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred ($200.00) Dollars to the United States of America;

14: That for the offense set out in Count Seven of the indictment herein the defendant Edgar Dehne shall pay a penalty of One ($1.00) Dollar to the United States of America;

(Secs. 3109, 3111, 3115, I.R.C. and A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

15: That for the offense set out in Count Eight of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred ($200.00) Dollars to the United States of America;

16: That for the offense set out in Count Eight of the indictment herein the defendant Edgar Dehne shall pay a penalty of One ($1.00) Dollar to the United States of America; [247]

(Secs. 3109, 3111, 3115, I.R.C. and A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

17: That for the offense set out in count Nine of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred ($200.00) Dollars to the United States of America;

18: That for the offense set out in Count Nine of the indictment herein the defendant Edgar Dehne shall pay a penalty of One ($1.00) Dollar to the United States of America;

(Secs. 3109, 3111, 3115, I.R.C. and A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

19: That for the offense set out in Count Ten of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred ($200.00) Dollars to the United States of America;

20: That for the offense set out in Count Ten of the indictment herein the defendant Edgar Dehne shall pay a penalty of One ($1.00) Dollar to the United States of America;

(Secs. 3109, 3111, 3115, I.R.C. and A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253;

21: That for the offense set out in Count Eleven of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred ($200.00) Dollars to the United States of America;

22: That for the offense set out in Count Eleven of the indictment herein the defendant Edgar Dehne shall pay a penalty of One ($1.00) Dollar to the United States of America;

(Secs. 3109, 3111, 3115, I.R.C. and A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

23: That for the offense set out in Count Twelve of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred [248] ($200.00) Dollars to the United States of America;

24: That for the offense set out in Count Twelve of the indictment herein the defendant Edgar Dehne shall pay a penalty of One ($1.00) Dollar to the United States of America;

(Secs. 3109, 3111, 3115, I.R.C. and A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

25: That for the offense set out in Count Thirteen of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred ($200.00) Dollars to the United States of America;

26: That for the offense set out in Count Thirteen of the indictment herein the defendant Edgar Dehne shall pay a penalty of One ($1.00) Dollar to the United States of America;

(Secs. 2800(a), 2802, 2803(a), 3111, 3112, 3115, I.R.C.; A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

27: That for the offense set out in Count Fourteen of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred ($200.00) Dollars to the United States of America;

28: That for the offense set out in Count Fourteen of the indictment herein the defendant Edgar Dehne shall pay a penalty of One ($1.00) Dollar to the United States of America;

(Secs. 2800(a), 2802, 2803(a), 3111, 3112, 3115, I.R.C.; A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

29: That for the offense set out in Count Fifteen of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred ($200.00) Dollars to the United States of America;

30: That for the offense set out in Count Fifteen of the indictment herein the defendant Edgar Dehne shall pay a [249] penalty of One ($1.00) Dollar to the United States of America;

(Secs. 2800(a), 2802, 2803(a), 3111, 3112, 3115, I.R.C.; A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

31: That for the offense set out in Count Sixteen of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred ($200.00) Dollars to the United States of America;

32: That for the offense set out in Count Sixteen of the indictment herein the defendant Edgar Dehne shall pay a penalty of One ($1.00) Dollar to the United States of America;

(Secs. 2800(a), 2802, 2803(a), 3111, 3112, 3115, I.R.C.; A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

33: That for the offense set out in Count Seventeen of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred ($200.00) Dollars to the United States of America;

34: That for the offense set out in Count Seventeen of the indictment herein the defendant Edgar Dehne shall pay a penalty of One ($1.00) Dollar to the United States of America;

(Secs. 2800(a), 2802, 2803(a), 3111, 3112, 3115, I.R.C.; A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

35: That for the offense set out in Count Eighteen of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred ($200.00) Dollars to the United States of America;

36: That for the offense set out in Count Eighteen of the indictment herein the defendant Edgar Dehne shall pay a penalty of One ($1.00) Dollar to the United States of America;

(Secs. 2800(a), 2802, 2803(a), 3111, 3112, 3115, I.R.C.; A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253) [250]

37: That for the offense set out in Count Nineteen of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred ($200.00) Dollars to the United States of America;

38: That for the offense set out in Count Nineteen of the indictment herein the defendant Edgar Dehne shall pay a penalty of One ($1.00) Dollar to the United States of America;

(Secs. 2800(a), 2802, 2803(a), 3111, 3112, 3115, I.R.C.; A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

39: That for the offense set out in Count Twenty of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred ($200.00) Dollars to the United States of America;

40: That for the offense set out in Count Twenty of the indictment herein the defendant Edgar Dehne shall pay a penalty of One ($1.00) Dollar to the United States of America;

(Secs. 2800(a), 2802, 2803(a), 3111, 3112, 3115, I.R.C.; A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

41: That for the offense set out in Count Twenty-one of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred ($200.00) Dollars to the United States of America;

42: That for the offense set out in Count Twen-

ty-one of the indictment herein the defendant Edgar Dehne shall pay a penalty of One ($1.00) Dollar to the United States of America;

(Secs. 2800(a), 2802, 2803(a). 3111, 3112, 3115, I.R.C.; A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253) [251]

43: That for the offense set out in Count Twenty-two of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of One Thousand ($1,000.00) Dollars to the United States of America; and,

44: That for the offense set out in Count Twenty-two of the indictment herein the defendant Edgar Dehne shall pay a penalty of One ($1.00) Dollar to the United States of America;

(Secs. 3116, 3111, 3115(a), I.R.C.; A. 146, Reg. No. 3, as amended).

It is further ordered and adjudged, and this does further order and adjudge:

1: That the Clerk of this Court deliver a certified copy of this judgment and committment to the United States Marshal, or other qualified officer, and that the same shall serve as the committment herein; and,

2: That this Judgment, and each and every part and portion of it, so far as the fines and penalties fixed therein, and each and all of them, are concerned, may be enforced by execution against the

property of the defendant liable for said fines and penalties in like manner as judgments in civil cases are enforced. (R. S. Sec. 1041; Sec. 569 T. 18 U.S.C.A.)

Done in open court at Butte, Montana, this 20th day of November, 1939.

JAMES H. BALDWIN
United States District Judge,
District of Montana.

[Endorsed]: Filed and entered November 20th, 1939. C. R. Garlow, Clerk. [252]

That thereafter, on the 20th day of November, 1939, the defendant, Edgar Dehne served and filed his Notice of Appeal.

That thereafter, on the 21st day of November, 1939, the defendant, United Cigar Whelan Stores Corporation, a corporation, served and filed its Notice of Appeal.

That thereafter, the court directed the United States Attorney and the attorneys for the appellants and defendants to appear before him at 1:30 o'clock p.m. on the 21st day of November, 1939, and at said time made the following

ORDER:

[Title of Court and Cause.]

Counsel for the respective parties were present in court at 1:30 o'clock P.M. this day for

receiving such directions as may be appropriate with respect to the preparation of the record on appeal herein.

Mr. R. Lewis Brown, Assistant District Attorney, was present and appeared for the United States, and Mr. Robert D. Corette and Mr. William A. Davenport were present and appeared for the defendants and appellants. The defendant Edgar Dehne was not personally present.

Thereupon, it appearing to the court that the appeal herein is to be prosecuted with a bill of exceptions, court ordered that within thirty days from this date the appellants shall procure to be settled and shall file with the clerk of this court a bill of exceptions setting forth the proceedings upon which the appellants wish to rely, in addition to those shown by the clerk's record of proceedings as described in Rule VIII; that within the same time the appellants shall file with the clerk of this court an assignment of [253] the errors of which appellants complain; and that upon the filing of the bill of exceptions and assignment of errors the clerk of this court shall forthwith transmit them, together with such matters of record as are pertinent to the appeal, with his certificate, to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

Entered November 21, 1939.

And now, within the time allowed by law, and as granted by the Court, the defendants present this, their proposed Bill of Exceptions, of all the proceedings had at the trial of the above entitled action and ask that the same may be signed, settled and allowed as true and correct.

Dated this 28th day of November, 1939.

CORETTE & CORETTE
ROBERT D. CORETTE and
WM. A. DAVENPORT
Attorneys for Defendants
and Appellants.

Service of the foregoing proposed Bill of Exceptions is admitted and copy thereof received this 28th day of November, 1939.

R. LEWIS BROWN
Assistant United States District
Attorney for the District of
Montana. [254]

United States of America
State of Montana
County of Silver Bow—ss.

I, James H. Baldwin, Judge of the District Court of the United States for the District of Montana, who presided at the trial of the foregoing action, do hereby certify: That said bill of exceptions is full, true and correct and contains all of the testimony and evidence offered and received upon said

trial and all of the testimony and evidence offered by the parties and excluded by the court, and all exceptions taken upon said trial, and all rulings by the court thereon and during said trial, and all instructions given by the court to the jury, and that there is incorporated in said bill of exceptions all rulings and orders made by the court and all exceptions thereto and all proceedings had in the cause against either of the parties, together with the objections and exceptions thereto made and reserved with all matters and proceedings had on the said trial, and the same is hereby settled and by me settled and signed and allowed as true, full and correct at the date herein.

Done and dated this 19 day of December, A. D. 1939.

JAMES H. BALDWIN,
Judge.

[Endorsed]: Lodged November 28, 1939. Filed December 19, 1939. [255]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Come now the defendants, United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne, and file the following Assignment of Errors upon which they will rely in the prosecution of the appeal herein from the verdict of the above entitled

Court, entered in the above entitled Court and cause on the 15th day of November, 1939, and from the judgment of the above entitled Court entered and pronounced in the above entitled Court and cause on the 20th day of November, 1939, and say that said verdict and judgment are erroneous and unjust to these defendants because:

I.

The Court erred in denying and overruling the motion of the defendants, United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne, objecting to the introduction of any evidence and asking for a dismissal of the indictment, which said motion and objection was made upon the following grounds and for the following reasons: First, that the indictment does not state facts sufficient to constitute an offense or offenses against the laws of the United States; second, that the facts set forth in counts one to twenty-two inclusive of the [256] indictment, do not state facts sufficient to constitute any offense against the laws of the United States; third, that counts number one, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, and twenty-one charge the defendants with offenses committed against the Revenue Laws of the United States between the dates of March 9, 1939 and April 15, 1939; that prior to that time, and on February 10, 1939, the Internal Revenue Code was re-enacted and the old Internal Revenue Code was repealed;

that the sections under which the indictments are brought in these counts which I have specified were brought under the old law which was repealed on February 10, 1939; the acts set forth in the indictment having occurred in March and April of 1939, therefore, at the time of the indictment, and as to these specified counts there was no law under which the indictment could be brought.

And for a further ground, these defendants object to the introduction of any evidence and ask for a dismissal of the indictments upon the grounds and for the reasons that regulation 4750, upon which all of the counts numbered one to twenty-two inclusive, and the entire indictment is based—that is Treasury Decision 4750—is in denial of due process of law, is unconstitutional and void.

II.

The Court erred in denying and overruling the motion of the defendants for a directed verdict and a verdict of acquittal, and for the dismissal of the indictment, at the close of the Government's case, which motion was made upon the following grounds and for the following reasons:

First, that the indictment does not state facts sufficient to constitute an offense against the laws of the United States.

Second, that each count of said indictment fails to state facts sufficient to constitute an offense against the laws of [257] the United States.

Third, that the government has failed to prove the matters and things charged in the indictment, and in each count thereof, beyond a reasonable doubt, or by any credible evidence.

Fourth, that there is an insufficiency of the evidence introduced by the government to prove the matters and things charged in the indictment.

Fifth, that there is an insufficiency of the evidence to show that the defendants, or either of them, were guilty of the offense or offenses charged in the indictment, or in any count thereof.

Sixth, that regulation 4750, upon which all twenty-two counts are based, states that the seller must reasonably deduce that it is the intention of the purchaser to procure the same for use for beverage purposes. That the purchaser in this case has testified in this case that it was not his intention to purchase it for beverage purposes, it being rubbing alcohol, but that he purchased the alcohol with the intention of using it as evidence, and never with the intention of drinking or selling it.

Seventh, there has been no proof that there has been a sale made of anything but rubbing alcohol; and there has been no proof that a Federal Stamp Tax or any Strip Tax, or any license is necessary for the sale of rubbing alcohol, and therefore counts number 1 and 11 to 21 inclusive should be dismissed. Further, that the only testimony offered on behalf of the government in the analysis of alcohol was to prove that it was rubbing alcohol, and the stamp

and sales tax and the United States liquor license provided for by the statutes of the United States do not cover stamp or strip tax or liquor license for the sale of rubbing alcohol.

The evidence is insufficient in the following particulars: [258] The Government failed to show that the defendant Edgar Dehne had any proprietory interest in the business of the United Cigar Whelan Stores Corporation, a corporation, and there is no evidence to show that said Edgar Dehne was any more than an employee of said defendant corporation. The evidence does show that Dehne was manager of the corporation's store in Butte, Montana, and that the United Cigar Whelan Stores Corporation, a corporation, is a corporation qualified to do and doing business in the State of Montana. The evidence is insufficient and will not sustain a verdict against the defendant Edgar Dehne under count one of the indictment, which said indictment charges the defendants, United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne with carrying on the business of a retail liquor dealer and wilfully failing to pay the special tax imposed by law. There is no evidence to show that the defendant Edgar Dehne was present in the defendant corporation's store at the time of any of the sales of rubbing alcohol as set forth in the indictment except four sales, namely, at 4:25 p.m. and 5:25 p.m. on March 9th, and 10:20 a.m. and 7 p.m. on March 10th, 1939. Therefore, the evidence

will not sustain a verdict, and is insufficient against the defendant Edgar Dehne on the counts wherein other persons besides Dehne made the sales, and on any counts where the sales were made by others than Dehne for failure to have strip or stamp taxes on the bottles of rubbing alcohol. That each of the other times charged in the indictment the evidence shows other employees to have been on duty and to have made the sales. There is insufficiency of the evidence to prove facts and circumstances from which the defendant Dehne could reasonably deduce that the purchaser intended to use the alcohol for beverage purposes. The evidence was that the person who purchased the alcohol failed to have an intent to use the same for beverage purposes but purchased it with the intent to use it [259] as evidence against the defendants. That the evidence fails to disclose that there has been any sale made of anything but rubbing alcohol and that there has been no proof that a Federal stamp tax or strip tax or any license is necessary for the sale of rubbing alcohol.

There is no proof by competent evidence that the defendants, on April 15th, 1939, possessed any quantity of Wecol with the intention to use it in violation of the law as charged in count twenty-two.

III.

The Court erred in admitting evidence concerning the sale of rubbing alcohol by persons other

than the defendant Dehne. The substance of such testimony given by Government witness Julius Johnson is in words and figures as follows: I was next in the store at 7:25 the same evening (March 9, 1939) dressed in the same clothes and at that time Cyril Varco was the name of the fellow that is clerking, was in there in charge. The question was then put: "What, if anything, did you say to that person?", at which time the following objection was made: "We object to the introduction of any evidence concerning any other person than Mr. Dehne, who is the person indicted in this complaint. The indictment reads 'to the defendants' throughout, which would mean Edgar Dehne and the United Cigar Store."

"The Court: Overruled."

"Mr. Corette: Exception."

"The Court: Exception noted."

"Q. All right. Now tell me what was said by you and Varco, the clerk behind the counter."

"A. I walked up to the counter and I said: 'Give me a box [260] of snuff.' He gave me the package and I paid him ten cents, and I said: 'Give me a bottle of alcohol too, will you?' And he wrapped up a bottle of rubbing alcohol and hands it to me and I walked out."

IV.

That the Court erred in admitting the following portion of the testimony of Government witness Roy H. Beadle:

"Q. Now, I will ask you about the first of January of this year and up until the 15th of April, what observation, if any, have you made, or what have you seen with reference to the United Cigar Store and the sale, if any, of rubbing alcohol?"

"Mr. Corette: To which we object on the ground and for the reason it does not tend to prove any issue in the case, and it is incompetent, irrelevant and immaterial, and does not relate to any of the purchases alleged in the indictment, but merely to general purchases."

"The Court: Overruled."

"Mr. Corette: Exception, please."

"The Court: Exception noted."

"Q. What have you observed, tell us."

"A. Why I have observed the traffic at the United Cigar Store, people going in and out, and I have noticed the dehorns and rubbing alcohol drunkards going into the United Cigar Store at different times in my duties on the corner."

"Q. And have you noticed them coming out of the store?"

"A. Yes, I have."

"Mr. Corette: The same objection, your Honor, to this entire line of testimony."

"The Court: Very well, the objection will be noted to each question."

"Mr. Corette: And exception." [261]

V.

That the Court erred in admitting the following portion of the testimony of defense witness Cyril Varcoe elicited upon cross examination:

"Q. Now, Mr. Varcoe, if a man came in to you, bought a pint of rubbing alcohol from you, and an hour after that the same man came back and bought another pint from you, and that another hour after that the same man came back and bought another pint from you, would you consider that man was using that for a legitimate purpose and make the sale to him?"

"Mr. Corette: The question assumes facts not in evidence; assumes three purchases from the same clerk; no evidence being introduced as to three purchases from the same clerk, and therefore, incompetent, irrelevant and immaterial."

"The Court: Overruled."

"Mr. Corette: Exception, please."

"The Court: The exception will be noted."

"Q. Do you have the question in mind?"

(Question read)

"A. Yes sir. I would. I bought six myself in one afternoon, and I could see how that would be all right. If the gentleman came in each time sober and without anything smelling on his breath."

VI.

The court erred in denying and overruling the motion of defendants, United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne for a directed verdict and a verdict of acquittal and for

the dismissal of the action at the close of all the evidence in the case and after the witnesses for both sides had been permanently excused, which motion was made upon the following grounds and for the following reasons:

First, that the indictment does not state facts sufficient to constitute an offense against the laws of the United States. [262]

Second, that each count of said indictment fails to state facts sufficient to constitute an offense against the laws of the United States.

Third, that the government has failed to prove the matters and things charged in the indictment, and in each count thereof, beyond a reasonable doubt, or by any credible evidence.

Fourth, that there is an insufficiency of the evidence introduced by the government to prove the matters and things charged in the indictment.

Fifth, that there is an insufficiency of the evidence to show that the defendants, or either of them, were guilty of the offense or offenses charged in the indictment, or in any count thereof.

Sixth, that regulation 4750, upon which all twenty-two counts are based, states that the seller must reasonably deduce that it is the intention of the purchaser to procure the same for use for beverage purposes. That the purchaser in this case has testified in this case that it was not his intention to purchase it for beverage purposes, it being rubbing alcohol, but that he purchased the alcohol with the intention of using it as evidence, and never with the intention of drinking or selling it.

Seventh, there has been no proof that there has been a sale made of anything but rubbing alcohol; and there has been no proof that a Federal Stamp Tax or any Strip Tax, or any license is necessary for the sale of rubbing alcohol, and therefore counts number 1 and 11 to 21 inclusive should be dismissed. Further, that the only testimony offered on behalf of the government in the analysis of alcohol was to prove that it was rubbing alcohol, and the stamp and sales tax and the United States liquor license provided for by the statutes of the United States do not cover stamp or strip tax or liquor license for the sale of rubbing [263] alcohol.

The evidence is insufficient in the following particulars: The Government failed to show that the defendant Edgar Dehne had any proprietory interest in the business of the United Cigar Whelan Stores Corporation, a corporation, and there is no evidence to show that said Edgar Dehne was any more than an employee of said defendant corporation. The evidence does show that Dehne was manager of the corporation's store in Butte, Montana, and that the United Cigar Whelan Stores Corporation, a corporation, is a corporation qualified to do and doing business in the State of Montana. The evidence is insufficient and will not sustain a verdict against the defendant Edgar Dehne under count one of the indictment, which said indictment charges the defendants, United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne with carrying on the business of a retail liquor dealer and

wilfully failing to pay the special tax imposed by law. There is no evidence to show that the defendant Edgar Dehne was present in the defendant corporation's store at the time of any of the sales of rubbing alcohol as set forth in the indictment except four sales, namely, at 4:25 p.m. and 5:25 p.m. on March 9th, and 10:20 a.m. and 7 p.m. on March 10th, 1939. Therefore, the evidence will not sustain a verdict, and is insufficient against the defendant Edgar Dehne on the counts wherein other persons besides Dehne made the sales, and on any counts where the sales were made by others than Dehne for failure to have strip or stamp taxes on the bottles of rubbing alcohol. That each of the other times charged in the indictment the evidence shows other employees to have been on duty and to have made the sales. There is insufficiency of the evidence to prove facts and circumstances from which the defendant Dehne could reasonably deduce that the purchaser intended to use the alcohol for beverage purposes. The evidence was that the person who [264] purchased the alcohol failed to have an intent to use the same for beverage purposes but purchased it with the intent to use it as evidence against the defendants. That the evidence fails to disclose that there has been any sale made of anything but rubbing alcohol and that there has been no proof that a Federal stamp tax or strip tax or any license is necessary for the sale of rubbing alcohol.

There is no proof by competent evidence that the defendants, on April 15th, 1939, possessed any quan-

tity of Wecol with the intention to use it in violation of the law as charged in count twenty-two.

The *the* evidence produced by the defendants proved that the defendants discriminated in an effort to at all times comply with the law in making their sales of rubbing alcohol whenever it appeared to the defendants that there was reason to suspect it was the intention of the purchaser to use the same for beverage purposes.

Wherefore, defendants, United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne, pray that the said verdict and judgment of the District Court of the United States, for the District of Montana, may be corrected and reversed, and for such other and further relief as to the Court may seem just and proper.

Dated this 28th day of November, 1939.

CORETTE & CORETTE
ROBERT D. CORETTE
WM. A. DAVENPORT
Attorneys for Defendants and Appellants,
United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne.

CORETTE & CORETTE,
ROBERT D. CORETTE and
WM. A. DAVENPORT
619-621 Hennessy Bldg.
Butte, Montana. [265]

Service of the foregoing Assignment of Errors is admitted and copy thereof received this 28th day of November, 1939.

R. LEWIS BROWN
Assistant United States
District Attorney.

[Endorsed]: Filed November 28, 1939. [266]

[Endorsed]: No. 9397. United States Circuit Court of Appeals for the Ninth Circuit. United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne, Appellants, vs. The United States of America, Appellee. Transcript of Record upon Appeal from the District Court of the United States for the District of Montana.

Filed December 29, 1939.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 9397

UNITED CIGAR-WHELAN STORES CORPORATION, a corporation, and
EDGAR DEHNE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL AND DESIGNATION OF RECORD TO BE PRINTED

The appellants in the above entitled action hereby adopt as the points on which they intend to rely on appeal, the original Assignment of Errors filed in the above entitled action.

The appellants in the above entitled action hereby designate as the record to be printed in the above entitled action, the entire transcript heretofore filed with the clerk of the above entitled court.

Dated: January 8, 1940.

JESSE H. STEINHART
JOHN J. GOLDBERG
Attorneys for Appellants.

[Endorsed]: Filed Jan. 9, 1940. Paul P. O'Brien, Clerk. [268]

No. 9397

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED CIGAR-WHELAN STORES CORPORATION (a corporation), and EDGAR DEHNE,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANTS.

JESSE H. STEINHART,
JOHN J. GOLDBERG,
111 Sutter Street, San Francisco, California,
Attorneys for Appellants.

CORETTE & CORETTE,
ROBERT D. CORETTE,
WILLIAM A. DAVENPORT,
Hennessy Building, Butte, Montana,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 9397

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED CIGAR-WHELAN STORES CORPORATION (a corporation), and EDGAR DEHNE,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANTS.

This is an action for alleged violations of 26 U.S.C.A. 1152a and 1397(a) (1) and 27 U.S.C.A. 85.*

The appellants were convicted in the District Court of the United States for the District of Montana, by the verdict of a jury on all counts of an indictment containing twenty-two counts, District Judge James H. Baldwin presiding.

*The sections of Title 26 of the U.S.C.A. above set forth had been repealed February 10, 1939, prior to the time of the alleged violations and at the time of the alleged violations, the time of trial, and now, are, respectively, Secs. 2803(a) and 3253 of the Internal Revenue Code. However, we believe that the indictment and trial and conviction under statutes, at none of said times in force, constituted harmless error, as identical or similar provisions appeared in the Internal Revenue Code. While the statutes in question are actually the sections of the Internal Revenue Code above cited, to eliminate confusion we will refer to the former sections of Title 26 of the U.S.C.A., as the entire record refers to those sections of Title 26.

BASIS OF JURISDICTION OF UNITED STATES DISTRICT COURT AND OF UNITED STATES CIRCUIT COURT OF APPEALS.

The crimes of which the appellants were accused, and for which they were convicted and sentenced, are created by 26 U.S.C.A. 1152a and 1397(a) (1) and 27 U.S.C.A. 85. Under the provisions of 28 U.S.C.A. 371 (Jud. Code, Sec. 256, amended), the courts of the United States are given exclusive jurisdiction of offenses cognizable under the authority of the United States, and under 28 U.S.C.A. 41 (Jud. Code, Sec. 24, amended), the district courts are given original jurisdiction of all such crimes and offenses.

The jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit arises under 28 U.S.C.A. 225(a) First and (d) (Jud. Code, Sec. 128, amended), and upon the timely compliance by appellants with the provisions of law and rules of the Supreme Court issued under 28 U.S.C.A. 723(a). The judgment of conviction was entered on November 20th, 1939 (R.* p. 221). On November 20th, 1939, the appellant Edgar Dehne served on the United States Attorney and filed with the clerk of the trial court, a notice of appeal (R. pp. 35, 235) and bail bond (R. p. 38). On November 21st, 1939, the appellent United Cigar-Whelan Stores Corporation served on the United States Attorney and filed with the clerk of the trial court a notice of appeal (R. pp. 42, 235) and bond guarantying payment of fines and penalties and cost bond (R. p. 45). On November 28th, 1939, the appellants procured to be settled and filed with

*Refers to printed Transcript of Record.

the clerk of the court a bill of exceptions setting forth the proceedings upon which the appellants wish to rely, in addition to those shown by the clerk's record of proceedings as described in Rule 8 of the United States Supreme Court "Rules of Practice and Procedure After Verdict in Criminal Cases Brought in District Courts of the United States." On November 28th, 1939, appellants also filed an assignment of the errors of which they complain. The bill of exceptions was settled by the trial judge on December 19th, 1939 (R. pp. 237-238). Thereafter, the clerk of the trial court transmitted the transcript of record upon appeal, including indictment, clerk's record of proceedings, record of trial, bill of exceptions and assignment of errors, to the clerk of this court, and said transcript of record was received and filed by the clerk of this court on December 29, 1939 (R. p. 251).

STATEMENT OF THE CASE.

Appellants were convicted of violations of 26 U.S.C.A. 1152a and 1397(a) (1), and 27 U.S.C.A. 85, the violation of said Section 85 consisting of a violation of a regulation of the Commissioner of Internal Revenue issued under the authority given him by 27 U.S.C.A. 83.

The indictment contains twenty-two counts, comprising four groups, summarized as follows:

(1) The first count alleges that the appellants carried on the business of retail liquor dealers without having paid the special tax required by law (R. pp. 3-5).

(2) The next ten counts allege that the appellants sold articles in the manufacture of which denatured alcohol was used, under circumstances from which they might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation of the Commissioner of Internal Revenue (Article 146-A, Regulations No. 3, as amended) (R. pp. 5-15).

(3) The next ten counts allege that the appellants sold articles in the manufacture of which denatured alcohol was used, under circumstances from which they might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, and that the sales were made in containers to which there was affixed no stamp evidencing payment of all Internal Revenue taxes imposed on the articles (R. pp. 15-27).

(4) The last count alleges that the appellants possessed articles in the manufacture of which denatured alcohol was used, with the intention of selling them under circumstances from which they might reasonably deduce that it was the intention of the purchaser to procure the same for use for beverage purposes (R. pp. 28-29).

The alleged offenses all occurred between March 9th, 1939 and April 15th, 1939. The counts of the indictment alleging a violation of the regulation of the Commissioner of Internal Revenue issued under the authority given him by 27 U.S.C.A. 83 (being counts 2 to 11 inclusive), and the count alleging a

violation of 26 U.S.C.A. 1397(a) (1) (being count 1), all described sales by the appellants to one Julius N. Johnson. The remaining counts do not name Julius N. Johnson as the purchaser, but it appears from the record, and it cannot be disputed, that the sales alleged in these counts were the same sales described in the prior counts (R. pp. 63-70).

At the trial of the action it appeared that Julius N. Johnson was an agent employed by the Alcohol Tax Unit of the Bureau of Internal Revenue (R. p. 62), that all purchases made by him were made solely to obtain evidence against the appellants (R. p. 81), and that he did not intend to and did not use any of the articles purchased by him for beverage purposes, nor were any of said articles used by anyone else for beverage purposes (R. p. 75, 81, 91). The only person who testified to the sales was agent Johnson. His testimony showed conclusively that he did not tell the clerks in the store he was purchasing the alcohol for beverage purposes, except at the times of the last two sales on April 15th, 1939, these sales being the ones set forth in counts 10, 11, 20 and 21. It further appeared that appellant United Cigar-Whelan Stores Corporation was the employer of appellant Edgar Dehne (R. pp. 58, 142), and that only some of the sales in question, namely, those made on March 9th, 1939, at 4:25 and 5:25 P.M., and on March 10th, 1939, at 10:20 A.M. and 7:00 P.M., and described in counts 2, 3, 6, 9, 12, 13, 16 and 19 of the indictment, were made by Dehne, the other sales having been made by other employees of appellant United Cigar-Whelan Stores Corporation (R. pp. 63-70).

It also appeared that the principal business of appellant United Cigar-Whelan Stores Corporation was the sale of cigars, cigarettes, pipe tobacco, pipes, and chewing gum, and that it also sold face lotions, perfumes, shaving soap and lotions, bay rum and rubbing alcohol (R. p. 154).

The principal question presented is whether sales to the agent of the Alcohol Tax Unit under the circumstances above set forth, neither such agent nor anyone else having used or intended to use the article sold for beverage purposes, constituted a violation of the regulation of the Commissioner of Internal Revenue above referred to. It is our belief that this question should be answered in the negative. If there was not a violation of this regulation, the government will undoubtedly concede that neither the Retail Liquor Dealers Special Tax provided by 26 U.S.C.A. 1397(a) (1), nor the strip stamps on the bottles containing the article sold provided for by 26 U.S.C.A. 1152a, were required, as there is no question but that this special tax and the strip stamps are not required when articles containing denatured alcohol are sold for proper purposes.

Appellants also contend:

(a) That the evidence was entirely insufficient to convict either of the appellants, except possibly as to the last two sales made on April 15th, 1939, which were made by Wilfred Maenpa, who was not a defendant in the action;

(b) That the action of the court in imposing sentences under each count of the indictment constituted

double punishment of the appellants, in violation of the Fifth Amendment to the Constitution of the United States;

(c) That appellant Dehne could not be convicted of carrying on the business of a retail liquor dealer, in violation of 26 U.S.C.A. 1397(a) (1), because it appeared that he was not the owner of the business in question but was merely an employee;

(d) That appellant Dehne should in no event have been convicted for more than four of the sales made; and

(e) That the court committed error in permitting the introduction in evidence of testimony inferentially indicating that the appellants were guilty of violations other than those set forth in the indictments.

SPECIFICATION OF ERRORS.

Appellants intend to rely upon the following assignments of errors: No. II, paragraphs Third, Fourth, Fifth, Sixth, Seventh (R. pp. 240-243), No. III (R. pp. 243-244), No. IV (R. p. 245), and No. VI, paragraphs Third, Fourth, Fifth, Sixth, Seventh (R. pp. 246-250).

THE GOVERNMENT FAILED TO PROVE A VIOLATION OF THE REGULATION OF THE COMMISSIONER OF INTERNAL REVENUE IN QUESTION (ART. 146-A, REGULATIONS NO. 3, AS AMENDED). THERE WAS NO EVIDENCE WHATSOEVER THAT THE PURCHASER OF THE RUBBING ALCOHOL, A GOVERNMENT AGENT, INTENDED TO OR DID, OR THAT ANYONE ELSE INTENDED TO OR DID, USE THE RUBBING ALCOHOL PURCHASED, FOR BEVERAGE PURPOSES, AND WITHOUT SUCH EVIDENCE IT IS IMPOSSIBLE TO HAVE A VIOLATION OF SAID REGULATION.

ASSIGNMENT OF ERROR II.

The court erred in denying and overruling the motion of the defendants for a directed verdict and a verdict of acquittal, and for the dismissal of the indictment, at the close of the Government's case, which motion was made upon the following grounds and for the following reasons:

* * * * * * *

Third, that the government has failed to prove the matters and things charged in the indictment, and in each count thereof, beyond a reasonable doubt, or by any credible evidence.

Fourth, that there is an insufficiency of the evidence introduced by the government to prove the matters and things charged in the indictment.

Fifth, that there is an insufficiency of the evidence to show that the defendants, or either of them, were guilty of the offense or offenses charged in the indictment, or in any count thereof.

Sixth, that regulation 4750, upon which all twenty-two counts are based, states that the seller must reasonably deduce that it is the intention of the purchaser to procure the same for use for beverage pur-

poses. That the purchaser in this case has testified in this case that it was not his intention to purchase it for beverage purposes, it being rubbing alcohol, but that he purchased the alcohol with the intention of using it as evidence, and never with the intention of drinking or selling it.

Seventh, there has been no proof that there has been a sale made of anything but rubbing alcohol; and there has been no proof that a Federal Stamp Tax or any Strip Tax, or any license is necessary for the sale of rubbing alcohol, and therefore counts number 1 and 11 to 21 inclusive should be dismissed. Further, that the only testimony offered on behalf of the government in the analysis of alcohol was to prove that it was rubbing alcohol, and the stamp and sales tax and the United States liquor license provided for by the statutes of the United States do not cover stamp or strip tax or liquor license for the sale of rubbing alcohol.

The evidence is insufficient in the following particulars: The Government failed to show that the defendant Edgar Dehne had any proprietory interest in the business of the United Cigar-Whelan Stores Corporation, a corporation, and there is no evidence to show that said Edgar Dehne was any more than an employee of said defendant corporation. The evidence does show that Dehne was manager of the corporation's store in Butte, Montana, and that the United Cigar-Whelan Stores Corporation, a corporation, is a corporation qualified to do and doing business in the State of Montana. The evidence is in-

sufficient and will not sustain a verdict against the defendant Edgar Dehne under count one of the indictment, which said indictment charges the defendants, United Cigar-Whelan Stores Corporation, a corporation, and Edgar Dehne with carrying on the business of a retail liquor dealer and wilfully failing to pay the special tax imposed by law. There is no evidence to show that the defendant Edgar Dehne was present in the defendant corporation's store at the time of any of the sales of rubbing alcohol as set forth in the indictment except four sales, namely, at 4:25 P.M. and 5:25 P.M. on March 9th, and 10:20 A.M. and 7 P.M. on March 10th, 1939. Therefore, the evidence will not sustain a verdict, and is insufficient against the defendant Edgar Dehne on the counts wherein other persons besides Dehne made the sales, and on any counts where the sales were made by others than Dehne for failure to have strip or stamp taxes on the bottles of rubbing alcohol. That each of the other times charged in the indictment the evidence shows other employees to have been on duty and to have made the sales. There is insufficiency of the evidence to prove facts and circumstances from which the defendant Dehne could reasonably deduce that the purchaser intended to use the alcohol for beverage purposes. The evidence was that the person who purchased the alcohol failed to have an intent to use the same for beverage purposes but purchased it with the intent to use it as evidence against the defendants. That the evidence fails to disclose that there has been any sale made of anything but rubbing alcohol and that there has been no proof that a Federal stamp

tax or strip tax or any license is necessary for the sale of rubbing alcohol.

There is no proof by competent evidence that the defendants, on April 16th, 1939, possessed any quantity of Wecol with the intention to use it in violation of the law as charged in count twenty-two.

ASSIGNMENT OF ERROR VI.

The court erred in denying and overruling the motion of defendants, United Cigar-Whelan Stores Corporation, a corporation, and Edgar Dehne for a directed verdict and a verdict of acquittal and for the dismissal of the action at the close of all the evidence in the case and after the witnesses for both sides had been permanently excused, which motion was made upon the following grounds and for the following reasons:

(Here follows (R. pp. 241-243) the balance of such assignment, commencing with paragraph third. Such portion is identical with the above-quoted portion of assignment II commencing with paragraph third thereof, and is not therefore repeated at this point.)

There was no evidence whatsoever that the purchaser of the rubbing alcohol, a government agent, intended to or did, or that anyone else intended to or did, use the rubbing alcohol purchased for beverage purposes, and without such evidence it is impossible to prove a violation of said regulation. The regulation of the Commissioner of Internal Revenue which it is alleged was violated, read as follows at the time of the alleged violations:

> "No person shall sell denatured alcohol, denatured rum, or any substance or preparation in the manufacture of which denatured alcohol or denatured rum is used, under circumstances from which he might reasonably deduce that it is the intention of the purchaser to procure the same for use for beverage purposes." (Art. 146-A, Reg. No. 3, as amended.)

It is clear that the regulation in question applies only to sales in which it is the intention of the purchaser to procure the articles in question for beverage purposes, and in which the circumstances under which the sales are made are such that the seller might reasonably have deduced the existence of that intention. Therefore, by virtue of the language of the regulation, two conditions must exist before there is a violation of the regulation in question—namely, the purchaser must intend to use the article for beverage purposes, and the circumstances under which the sale is made must be such that the seller might reasonably have deduced that this intention existed. If either of these conditions does not exist, the regulation has not been violated and no crime has been committed. This, it seems, is an entire answer to the claim of the government that the regulation has been violated, because it appears conclusively and without a question of a doubt that the purchaser, a government agent, at no time intended to use the articles for beverage purposes, and did not procure them with that intention.

The foregoing construction and application of an indistinguishable regulation was adopted by the

United States Circuit Court of Appeals for the Sixth Circuit, in the case of *Sherman v. United States,* 10 Fed. (2d) 17. In that case the appellant was convicted of violating the National Prohibition Act by the sale to a government agent of a bottle of Jamaica ginger. The provision alleged to have been violated provided that articles of the type in question were not subject to the provisions of the act, but further provided that:

> "Any person who shall knowingly sell (such preparations) for beverage purposes * * * or * * * under circumstances from which the seller might reasonably deduce the intention of the purchaser to use them for such purposes * * * shall be subject to the penalties (of this Act)."

Sherman was indicted on two counts, one for having knowingly sold the preparation for beverage purposes, and the other for having sold it under circumstances from which he should reasonably have deduced the agent's intention to use it for a beverage. At the trial, it appeared that the agent did not use the article purchased for a beverage and never intended to do so, but bought it for the sole purpose of turning it over to the officer for "evidential and not drinking purposes," and that this was done. The court stated that the sole question was whether the seller's guilty intent or knowledge of circumstances required by the statute above quoted, which could make him guilty, could be merely his independent purpose or conclusion, or whether it was also necessary to prove the purchaser's actual intent to use the article for beverage purposes. The court definitely held

a conviction could not be sustained in a case where the purchase had been made by a government agent and it was undisputed that the agent did not intend to use the article for beverage purposes, stating as follows (p. 18):

> "'This conclusion [that the circumstances were such as to indicate that the purchaser intended to use it for beverage purposes] leaves the conviction best supported, if supportable at all, by the 'circumstances from which' clause, and presents the question whether the seller's intent or reason to believe, which can make him guilty, may be merely his independent purpose or conclusion, or whether it can exist only as collateral to the purchaser's actual intent. We say that his conviction is best supported by the latter clause, because, as to the former, 'knowingly sell,' it is difficult to conceive knowledge of a thing which does not exist, while the 'circumstances under which' clause is, if read literally, open to be construed as wholly satisfied by the seller's state of mind. For a concrete example of this construction, we observe that, if a purchaser really needed the Jamaica ginger for medicine, and intended so to use it, and did so use it, but if his appearance or answers justified the inference that he probably wanted to drink it, the sale would be a crime by the seller. Did Congress so intend?
>
> The difference between such a sale and an ordinary one of intoxicating liquor is fundamental. The constitutional power is clear to prohibit broadly all sales of intoxicating liquor, whether for beverage purposes or not, provided suitable provision is made for such nonbeverage sales as are consistent with the purpose of the constitu-

tional amendment, and so we find section 3 (Comp. St. Ann. Supp. 1923, Sec. 10138½aa) containing a general and initial prohibition of all sales of intoxicating liquor. However, medicinal preparations are not within the ordinary definition of intoxicating liquor, and perhaps not within the definition of section 1 (Comp. St. Ann. Supp. 1923, Sec. 10138½), and to clear the doubt, if there is any, the first part of section 4 exempts them wholly from the operation of the act. Up to this point, the situation, then, is that the sale of what is commonly called intoxicating liquor is generally forbidden and the sale of these medicinal preparations is generally permitted. Thus the two transactions are approached from opposite viewpoints, and it would seem that the burden of establishing the exception is oppositely imposed.

It is contrary to the general principles of criminal law—except in conspiracy—that the mere intent to violate the law, not followed by actual violation, should be a crime. We think the ultimate thing at which this part of section 4 was aimed was such intoxication as might be caused through the purchase of these preparations by one who intended to use them to drink, and we conclude that participation by the seller in this actual intent by the purchaser furnishes the only reasonable basis for transforming the otherwise permitted sale into a prohibited one. It is the reasonable and consistent construction of this part of the statute to regard it as directed against those sales which were in fact for drinking purposes, and where the seller either knew or should have known this purpose. It follows that, unless the purchaser at the time of the purchase intends

> beverage use, there is no violation of law in which the seller can participate, either by direct purpose or by equivalent indifference and negligence.
>
> We get no helpful analogy from the numerous instances of a transaction by two parties, where the criminal intent of only one of them is held to be sufficient to make him guilty—like an acceptance of a bribe offered only as a test, or like the other familiar entrapment cases. In all of those the necessary intent of the respondent rests sufficiently upon the act done by him; in the present case the respondent's effective intent is, as we construe the statute, declared to rest, necessarily and only, upon the actual intent of the other party to the transaction."

In the case of articles containing denatured alcohol, as in the case of Jamaica ginger in the above cited case, the sale without payment of the internal revenue tax by a person who has not paid the special retail liquor dealers tax is generally permitted, and it is only where the sale actually accomplishes what the regulation and statute seek to prevent, namely, the use as a beverage of alcohol upon which the internal revenue tax has not been paid, that the regulation and statute have been violated and a crime has been committed.

If the government's contention that the actual intention of the purchaser is immaterial were correct, a sale for admittedly legal purposes, to a purchaser (not a government agent) who intended to and did use the article purchased for entirely legitimate purposes, might subject the seller to a prosecution for a

violation of the regulation, if, in the opinion of the government it appeared that the circumstances under which the sale was made were such that the seller "should have deduced" that it was the intention of the purchaser to procure the article for use for beverage purposes. It is submitted that the regulation in question does seek to prevent such sales, but only sales which result in the use of non-tax-paid alcohol for beverage purposes.

A provision somewhat similar to the regulation in question was under consideration in the case of *Bernstein v. State,* 199 Ind. 704, 160 N.E. 296. The statute in question, prohibiting the sale of intoxicating liquor, contained three classifications of such liquor, the first being all malt, vinous or spirituous liquor containing as much as one-half of one per cent of alcohol, the second, every other drink, mixture or preparation of like alcoholic content, whether patented or not, reasonably likely or intended to be used as a beverage, and the third, all other intoxicating beverages or preparations, whether alcoholic or not, intended for beverage purposes. The appellant was convicted under an indictment, one count of which charged that he did unlawfully manufacture, possess, transport, sell, barter, exchange, give away, furnish and otherwise dispose of, intoxicating liquor. On the trial it appeared that Nutter, a federal prohibition officer, went to appellant's place of business and represented that he was in business in Kokomo and that he wanted to use the malt extract in question in his poolroom, "to sell it as a beverage." It was stipulated that the malt extract in question contained 3.4% of

alcohol by volume. The Court of Appeals decided that the articles sold did not come under the first classification of the statute, and that the appellant could not be convicted unless the purchaser actually intended to use the articles for beverage purposes, stating (160 N.E. at p. 297):

> "But, if it be conceded that malt extract can be used as a medicinal tonic, and also that it is reasonably likely or intended to be used as an alcoholic beverage, its sale and use as medicinal tonic is as lawful as the sale of any other drug which contains a like amount of alcohol, while its sale for beverage purposes is as unlawful as the sale of any intoxicating liquor containing a like amount of alcohol. The evidence here is not sufficient to prove that appellant sold the malt extract for beverage purposes, and it is clear that it was neither purchased nor used for that purpose. The prohibition agent testified that he said that he wanted to sell it to his customers, and it appears that in fact he wanted it only to use as evidence in a prosecution in the United States District Court, and, failing in that, to use in this prosecution."

The above case goes even farther than we ask the court to go in the instant case, because in that case the statute obviously by its terms required only an intent on the part either of the seller or the purchaser. The testimony of the federal prohibition officer showed that the seller had the prohibited intent, but the court held that that was not sufficient and that it must also be shown that the purchaser had that intent. While the court did not so state, it undoubtedly

based its decision on the principle that the only sales which violate the act are those which actually accomplish what the act seeks to prevent, namely, sales which actually result in the use of the articles sold as a beverage. We submit that similarly, in the instant case, the regulation is violated only by a sale which accomplishes what the regulation seeks to prevent, namely, the actual use as a beverage of alcohol on which the tax imposed on beverage alcohol has not been paid.

THE EVIDENCE WAS INSUFFICIENT TO CONVICT APPELLANTS ON ANY COUNTS WHATSOEVER EXCEPT POSSIBLY THOSE ARISING OUT OF THE LAST TWO SALES MADE ON APRIL 15th, 1939.

ASSIGNMENT OF ERROR II.

The court erred in denying and overruling the motion of the defendants for a directed verdict and a verdict of acquittal, and for the dismissal of the indictment, at the close of the government's case, which motion was made upon the following grounds and for the following reasons:

* * * * * * *

Third, that the government has failed to prove the matters and things charged in the indictment, and in each count thereof, beyond a reasonable doubt, or by any credible evidence.

Fourth, that there is an insufficiency of the evidence introduced by the government to prove the matters and things charged in the indictment.

Fifth, that there is an insufficiency of the evidence to show that the defendants, or either of them, were

guilty of the offense or offenses charged in the indictment, or in any count thereof.

ASSIGNMENT OF ERROR VI.

The court erred in denying and overruling the motion of defendants, United Cigar-Whelan Stores Corporation, a corporation, and Edgar Dehne for a directed verdict and a verdict of acquittal and for the dismissal of the action at the close of all the evidence in the case and after the witnesses for both sides had been permanently excused, which motion was made upon the following grounds and for the following reasons:

* * * * * * *

Third, that the government has failed to prove the matters and things charged in the indictment, and in each count thereof, beyond a reasonable doubt, or by any credible evidence.

Fourth, that there is an insufficiency of the evidence introduced by the government to prove the matters and things charged in the indictment.

Fifth, that there is an insufficiency of the evidence to show that the defendants, or either of them, were guilty of the offense or offenses charged in the indictment, or in any count thereof.

* * * * * * *

The evidence is insufficient in the following particulars:

* * * * * * *

There is insufficiency of the evidence to prove facts and circumstances from which the defendant Dehne could reasonably deduce that the purchaser intended

to use the alcohol for beverage purposes. The evidence was that the person who purchased the alcohol failed to have an intent to use the same for beverage purposes but purchased it with the intent to use it as evidence against the defendants. That the evidence fails to disclose that there has been any sale made of anything but rubbing alcohol and that there has been no proof that a Federal stamp tax or strip tax or any license is necessary for the sale of rubbing alcohol.

There is no proof by competent evidence that the defendants, on April 15th, 1939, possessed any quantity of Wecol with the intention to use it in violation of the law as charged in count twenty-two.

The only witness who testified concerning the sales and the circumstances under which they were made was the agent, Julius N. Johnson (R. pp. 62-82, inc.). His testimony was in substance as follows:

When he made all the purchases he was dressed in old overalls, a shirt, an old sweater, a lumber jack mackinaw and slouch hat. In dressing in that manner he was attempting to simulate a "bum." On March 9th, 1939, he purchased one bottle of rubbing alcohol from appellant Dehne at 4:25 P.M., another from Dehne at 5:25 P.M., another at 7:25 P.M. from a clerk named Varco, and another at 8:25 P.M. from Varco. On March 10th, 1939, he purchased one bottle from Dehne at 10:20 A.M., another at 12:20 P.M. from Varco, another at 5:00 P.M. from Varco, and another at 7:00 P.M. from Dehne. On April 15th, 1939, he purchased one bottle at 9:15 A.M. from a clerk named

Walter Maenpa, and four bottles at 10:45 A.M. from Maenpa. At no time except on April 15th, 1939, did he say anything to the appellant Dehne or the other clerks except "Give me a bottle of alcohol," or "Give me another bottle of alcohol" (except to ask for other merchandise, such as cigarettes or snuff) (R. p. 68). There is no evidence that Johnson talked to or saw Dehne on April 15th, 1939.

The first time he made any statement whatsoever indicating that he might intend to drink the alcohol was at the time of the purchase of one bottle on April 15th, 1939, when he said "Haven't you the other brand. I like that better to drink than I do this" (R. p. 69), and "Well, that is all right, I can drink it. Either one will put hair on your chest" (R. p. 70). The only other time he made any statement concerning drinking the alcohol was when he returned to the store an hour and a half after the first purchase on April 15th, 1939, and made the purchase of four bottles from Maenpa, when he said: "Give me four pints of alcohol, will you? That other pint didn't last long with four or five of us drinking out of it." (R. p. 70).

He did not, nor did any one else, testify that he was intoxicated at the time of any of the purchases, or even that he had the smell of alcohol or liquor on his breath.

Obviously, except for the two sales on April 15th, 1939, the only evidence the government can rely on to show that the circumstances were such as to indicate that Johnson intended to procure the alcohol for beverage purposes is that Johnson was dressed in

working clothes which were not new, that thereby he attempted to simulate a "bum" and that on several occasions he purchased one bottle an hour, or two or more hours, after he had made a prior purchase.

As respects the clothes which Johnson wore, there is no evidence that respectable law abiding residents of Butte, Montana, particularly of the working class, were not similarly clothed. The evidence is that most of the customers of the store in question were of the working class, the bulk of them miners (R. pp. 160-161).

With reference to the proximity of one sale to another, it should be noted that there were about 500 customers and 200 non-customers in the store every day (R. pp. 145-7), so it cannot be assumed that appellant Dehne or the other clerks should necessarily have recognized Johnson when he made subsequent purchases, especially as he did not say anything indicating that he had made a prior purchase except as that might be inferred by his use of the word "another." Even with respect to the purchases on April 15th, 1939 (which were not made from appellant Dehne), it is submitted that the clerk might have thought he was simply joking, particularly as he obviously had not drunk any of the first bottle when he returned and bought four.

Certainly flimsy evidence such as this should not be legally sufficient to convict the appellants of the serious crimes with which they were charged, and we submit that even the jury would not have convicted the appellants except for errors committed by

the court, particularly in the admission of evidence which inferentially, at least, indicated the appellants were guilty of other crimes than those charged.

THE IMPOSITION OF SENTENCE UNDER EACH COUNT OF THE INDICTMENT CONSTITUTED DOUBLE PUNISHMENT, IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Both of the appellants were found guilty on all 22 counts of the indictment, and the trial judge imposed sentence on both of the appellants on each and every count. Counts 2 to 11 inclusive allege the sale of articles in the manufacture of which denatured alcohol was used, under circumstances from which the appellants might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of the regulation of the Commissioner of Internal Revenue. Counts 12 to 21 inclusive allege that the appellants sold articles in the manufacture of which denatured alcohol had been used, under circumstances from which they might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, and that the sales were made in containers to which there was affixed no stamp evidencing payment of all Internal Revenue taxes imposed on the articles. Count 22 alleges that the appellants possessed articles in the manufacture of which denatured alcohol was used, with the intention of selling them under circumstances from which they might reasonably deduce that it was the inten-

tion of the purchaser to procure the same for use for beverage purposes.

In order to convict under Counts 12 to 21 inclusive, it was necessary for the government to prove the sale in unstamped containers of articles in the manufacture of which denatured alcohol was used, under circumstances from which appellants might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes; and under Counts 2 to 11 inclusive, it was also necessary for the government to prove the sale of articles in the manufacture of which denatured alcohol was used, under circumstances from which the appellants might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes. The record shows conclusively that the sales alleged in Counts 2 to 11 inclusive were the same sales alleged in Counts 12 to 21 inclusive. In order to convict under Count 22, it was only necessary to prove possession of the same articles which it is alleged were sold by the appellants, and that the sales were made under circumstances from which they might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes.

It has been held that the Fifth Amendment applies to double punishment for the same offense as well as to subsequent prosecutions for the same offense for which a defendant has been theretofore tried.

In the case of *United States v. Levinson,* 54 Fed. (2d) 363, appellants had been convicted on one count

charging transportation of liquor, and on another count charging possession of the same liquor. The sentence on the count charging transportation had been suspended, and the defendant sentenced to pay a fine under the count charging possession. The court held that this was reversible error, stating (p. 363):

> "The court erroneously imposed a fine of $400 on the third count" (the one charging possession) "when it retained jurisdiction to sentence for transportation. It could not do both. It was the possession in the truck that resulted in the conviction for transportation from the boat to the truck. Schroeder v. United States, 7 Fed. (2d) 60 (C.C.A. 2); United States v. Rubin, 49 Fed. (2d) 273 (C.C.A. 2). While sentence remained suspended on the second count, the transportation, it left with the court the power to sentence on that count which, if done, would impose a double punishment since the two counts, the second and third, charged but a single offense."

In the case of *Tritico v. United States,* 4 Fed. (2d) 664, the appellants were convicted on three counts, the first of which alleged unlawful possession of liquor, the second, possession of property designed for the manufacture of liquor, and the other, unlawful manufacture. The court held that the sentence under all three counts was in violation of the Fifth Amendment, stating (p. 665):

> "* * * the third count is the only one which should have been considered when passing sentence because the manufacture therein charged includes the possession of liquor charged in the first count and the possession of distillery apparatus charged in the second count.

Under the Fifth Amendment one may not for the same offense be twice put in jeopardy. The test of what is the same offense is stated by Mr. Bishop to be 'whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction; when there could, the second cannot be maintained; when there could not, it can be.' " (Citing cases).

"In several of the above cases the Supreme Court cites with approval Morey v. Commonwealth, 108 Mass. 433, in which it is said:
'A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.'

In the Neilsen case, supra, it is said:
'Where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.'

Applying this well-established rule to the indictment in this case, it must be apparent at once that proof of possession of distillery apparatus would necessarily have to be included in order to prove the manufacture of liquor, because such

manufacture would otherwise be impossible. Likewise the same evidence which proved manufacture of liquor proved possession of it, because, upon the manufacture being completed, the liquor necessarily came into the control or possession of the manufacturer. *It can make no difference whether separate charges are tried together or at different times.* If the defendants had been tried for manufacturing liquor, they could not afterwards have been prosecuted for possessing the apparatus necessary for such manufacture or for possessing the liquor so manufactured. It is true that evidence of possession of apparatus would not be required to prove possession of liquor, and vice versa, so that convictions could be had upon both the first and second counts. It is likewise true that a conviction under either the first or second count would not prevent a conviction under the third count, because proof of manufacture requires additional evidence. But these results do not militate against the conclusion that a conviction under the third count for manufacture would bar a prosecution under the first or the second count for unlawful possession of apparatus or liquor. Reynolds v. United States (C.C.A.) 280 F. 1; Morgan v. United States (C.C.A.) 294 F. 82.

The conclusion is that the sentence is excessive." (Italics ours).

See also:

Ex parte Neilsen, 33 L. Ed. 118, 131 U.S. 176, 9 Sup. Ct. 672;

United States v. Crushiata, 59 Fed. (2d) 1007;

Krench v. United States, 42 Fed. (2d) 354;

Goetz v. United States, 39 Fed. (2d) 903;

Bertsch v. Snook, 36 Fed. (2d) 155;
Woods v. United States, 26 Fed. (2d) 63;
Cain v. United States, 19 Fed. (2d) 472;
Diaz v. United States, 15 Fed. (2d) 369;
Gray v. United States, 14 Fed. (2d) 366;
Friedman v. United States, 13 Fed. (2d) 632;
Dexter v. United States, 12 Fed. (2d) 777;
Rouda v. United States, 10 Fed. (2d) 916;
Green v. United States, 8 Fed. (2d) 140;
Schechter v. United States, 7 Fed. (2d) 881;
Patrilo v. United States, 7 Fed. (2d) 804;
Schroeder v. United States, 7 Fed. (2d) 60;
Morgan v. United States, 294 Fed. 82;
Reynolds v. United States, 280 Fed. 1;
Braden v. United States, 270 Fed. 441, at 444.

As stated above, the evidence which was necessary to convict under the counts alleging sales in unstamped containers was sufficient to convict under the counts alleging the violation of the regulation of the commissioner, and under the last count alleging possession. If the evidence under one count is sufficient to convict under another count, punishment of the defendant under both counts is double punishment, in violation of the Fifth Amendment. It is not necessary that each count require identical evidence.

In the case of *Reynolds v. United States,* supra, the defendant had been convicted under an indictment, one count of which charged unlawful possession and manufacture of liquor, and another the possession of the implements and materials designed for the

manufacture of liquor. The conviction was reversed, the court stating (p. 4):

> "We do not understand it necessary to double punishment that each offense contain an element not found in the other."

In the case of *Krench v. United States,* supra, the appellant was convicted under an indictment containing three counts, the first of which charged the bringing of merchandise into the country, in violation of a tariff act, the second, concealment of merchandise after it had been brought in, in violation of the act, and the third, conspiracy to import and bring merchandise into the country, in violation of the same act. It appeared that he did not actually bring the merchandise into the country but only procured others to do so, and for that reason only was found guilty on the first count. The court held that he could not be convicted on all counts, and said (p. 356):

> "He might have been proved guilty of the conspiracy but not of the substantive offense. It is clear, though, that the proof of the substantive offense included every element of the conspiracy. If he had been indicted and convicted as a principal because he procured others to commit the act charged in the first count, we cannot doubt that to punish him for the same act proved by the same evidence under a second indictment would be double punishment. This was the test laid down in Reynolds v. United States, 280 Fed. 1 (6 C.C.A.) where this court reviewed many authorities and held that although it is competent for Congress to create separate and distinct offenses growing out of the same transaction, where

> it is necessary in proving one offense to prove every essential element of another growing out of the same act, a conviction of the former is a bar to a prosecution for the latter. Cf. Reynolds v. United States, 282 Fed. 256 (6 C.C.A.); Miller v. United States, 300 Fed. 529 (6 C.C.A.); Tritico v. United States (C.C.A.) 4 Fed. (2d) 464; Rouda, et al. v. United States (C.C.A.) 10 Fed. (2d) 916; Gatti v. United States, 35 Fed. (2d) 959 (6 C.C.A.).
>
> The facts which the government was forced to rely upon in this case to prove the substantive offense charged in the first count also proved the offense charged in the third count, and in our opinion it is double punishment to pass sentence upon appellant on both counts."

In the case of *Cain v. United States,* supra, the indictment contained two counts, one of which alleged that the defendant did "deal in, dispense, sell and distribute" (morphine) "to one Draper," and the second, that he "did knowingly send" (morphine) "to said Draper." It appeared that there was only one shipment of morphine to Draper. The court said (pp. 475-476):

> "We think the true rule deducible both from the cases and the reason of the thing is 'that where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.' In re Neilsen, 131 U.S. loc. cit. 188, 9 S.Ct. 676, 33 L.Ed. 118. In the above excerpt the Supreme Court obviously used the word incidents in the same sense

> as the word elements. So assuming, the Neilsen case is squarely in point with the situation here presented. * * *
>
> Obviously, and bearing upon the question already discussed, there can be no better proof of the existence of double jeopardy than the fact that an acquittal on one count of an indictment and a conviction on another inevitably brings about a contradiction on the face of the verdict. Singleton v. United States (C.C.A.), 294 Fed. 890. We think the trial court should of its own motion have required the government to elect at the close of the evidence; or that the jury should have been charged that if they found defendant guilty on either count, they should acquit him on the other."

In the case of *Rouda v. United States,* supra, the defendant's conviction on two separate counts—one for manufacturing and the other for possessing liquor—was set aside, the court stating (p. 918):

> "The conviction upon the possession count was, however, irregular, since all the elements necessary to it were included in the count for manufacture."

If there is double punishment, the appellate court will set aside that portion of the judgment which imposes double punishment, even if the question is not presented by the appellant. In the case of *Rossman v. United States,* 280 Fed. 950, the court said:

> "There is, however, another question in this case, that was not presented by counsel for plaintiff in error, either to the trial court or to this court; but, in view of the fact that it is vital to the

> defendant, we think it should be considered by this court in the disposition of this error proceeding'' (Citing cases).

The court then considered the question and reversed the conviction and sentence on three of the four counts.

As there was clearly double punishment in the imposition of the sentence under all the counts, and as the elements which had to be proved under counts 12 to 21 inclusive, namely, that the defendants sold articles in the manufacture of which denatured alcohol was used under circumstances from which they might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, and that these sales were made in unstamped containers, would, without the addition of any other element or elements, prove the offenses charged under counts 2 to 11 inclusive and 22, the sentences on counts 2 to 11 inclusive and 22 were excessive and should be set aside.

ONLY THE PROPRIETOR OF A BUSINESS CAN BE GUILTY OF A VIOLATION OF 26 U.S.C.A. 1397(a)(1). THIS STATUTE PROVIDES THAT ANYONE WHO CARRIES ON THE BUSINESS OF A RETAIL LIQUOR DEALER WITHOUT HAVING PAID THE SPECIAL TAX REQUIRED BY LAW IS SUBJECT TO CERTAIN PENALTIES. AS APPELLANT DEHNE WAS ONLY AN EMPLOYEE OF THE PROPRIETOR OF THE BUSINESS, HE WAS NOT GUILTY OF A VIOLATION OF THIS STATUTE.

ASSIGNMENT OF ERROR VI.

The court erred in denying and overruling the motion of defendants, United Cigar-Whelan Stores Corporation, a corporation, and Edgar Dehne for a directed verdict and a verdict of acquittal and for the dismissal of the action at the close of all the evidence in the case and after the witnesses for both sides had been permanently excused, which motion was made upon the following grounds and for the following reasons:

* * * * * * *

Third, that the government has failed to prove the matters and things charged in the indictment, and in each count thereof, beyond a reasonable doubt, or by any credible evidence.

Fourth, that there is an insufficiency of the evidence introduced by the government to prove the matters and things charged in the indictment.

Fifth, that there is an insufficiency of the evidence to show that the defendants, or either of them, were guilty of the offense or offenses charged in the indictment, or in any count thereof.

* * * * * * *

The evidence is insufficient in the following particulars: The government failed to show that the de-

fendant Edgar Dehne had any proprietory interest in the business of the United Cigar-Whelan Stores Corporation, a corporation, and there is no evidence to show that said Edgar Dehne was any more than an employee of said defendant corporation. The evidence does show that Dehne was manager of the corporation's store in Butte, Montana, and that the United Cigar-Whelan Stores Corporation, a corporation, is a corporation qualified to do and doing business in the State of Montana. The evidence is insufficient and will not sustain a verdict against the defendant Edgar Dehne under count one of the indictment, which said indictment charges the defendants, United Cigar-Whelan Stores Corporation, a corporation, and Edgar Dehne with carrying on the business of a retail liquor dealer and wilfully failing to pay the special tax imposed by law.

Even assuming that there was a violation of the regulation of the Commissioner hereinabove referred to, and that therefore the special retail liquor dealers tax which was referred to in 26 U.S.C.A. 1397(a)(1) should have been paid, appellant Dehne could not be guilty of a violation of this section. As stated above, there is no question but that Dehne was an employee of United Cigar-Whelan Stores Corporation, which was the owner of the business and the proprietor of the store (R. pp. 58, 142). The pertinent portions of the statute in question read as follows:

Section 1397:

"(a) Rectifiers, liquor dealers, dealers in malt liquors, and manufacturers of stills—(1) Non-

> payment of special tax: Any person *who shall carry on the business* of a * * * retail liquor dealer without having paid the special tax as required by law shall for every such offense be fined not less than $100 nor more than $5,000 and imprisoned not less than thirty days nor more than two years * * *." (Italics ours.)

It seems clear that an employee does not "carry on the business" and is therefore not subject to the penalty set forth in the statute, and this has been held by the Circuit Court of Appeals of the Fifth Circuit in the case of *Anderson v. United States,* 30 Fed. (2d) 485. In that case the appellant had been convicted of carrying on the business of a retail liquor dealer without having paid the special tax therefor, in violation of Section 3242, Revised Statutes. The statute under which the appellant was convicted appeared in 26 U.S.C.A. 1397(a)(1) and now appears in Section 3253 of the Internal Revenue Code, in practically identical language. The appellant had requested an instruction stating, in part, that before he could be convicted, the jury must find that he participated in the carrying on of such business. The trial court refused to give this instruction and gave the following one:

> "A statute of the United States provides that one who aids or assists another in the commission of an offense, or procures the commission of an offense is guilty as a principal, just as much so as one who actually commits the offense." (Referring, obviously, to Section 550 of Title 18 of the U.S.C.A.)

The court held (p. 487):

> "Conceding arguendo that there was sufficient to go to the jury to show that Anderson" (the appellant) "was either a principal or accomplice in making the sales, it is very doubtful that there was enough to show that he was *conducting a business* without a license. One who is a *mere employee* may be guilty as an accomplice of making an illegal sale of liquor, but he cannot be an accomplice and therefore regarded as a principal in conducting a business unless he is in fact *one of the proprietors whose duty it is to pay the license tax.* U.S. v. Logan, Fed. Cas. 15,624. We think under the circumstances here disclosed the refusal of the requested charge and the giving of the above quoted portion of the general charge constituted prejudicial error." (Italics ours.)

See, also,

U. S. v. Logan, Fed. Cas. 15,624.

APPELLANT DEHNE SHOULD IN NO EVENT HAVE BEEN CONVICTED FOR MORE THAN FOUR OF THE SALES ALLEGED TO HAVE BEEN MADE.

ASSIGNMENT OF ERROR III.

The court erred in admitting evidence concerning the sale of rubbing alcohol by persons other than the defendant Dehne. The substance of such testimony given by government witness Julius Johnson is in words and figures as follows: I was next in the store at 7:25 the same evening (March 9, 1939) dressed in the same clothes and at that time Cyril Varco

was the name of the fellow that is clerking, was in there in charge. The question was then put: "What, if anything, did you say to that person?", at which time the following objection was made: "We object to the introduction of any evidence concerning any other person than Mr. Dehne, who is the person indicted in this complaint. The indictment reads 'to the defendants' throughout, which would mean Edgar Dehne and the United Cigar Store.

The Court. Overruled.

Mr. Corette. Exception.

The Court. Exception noted.

Q. All right. Now tell me what was said by you and Varco, the clerk behind the counter.

A. I walked up to the counter and I said: 'Give me a box of snuff.' He gave me the package and I paid him ten cents, and I said: 'Give me a bottle of alcohol too, will you?' And he wrapped up a bottle of rubbing alcohol and hands it to me and I walked out."

ASSIGNMENT OF ERROR VI.

The court erred in denying and overruling the motion of defendants, United Cigar-Whelan Stores Corporation, a corporation, and Edgar Dehne for a directed verdict and a verdict of acquittal and for the dismissal of the action at the close of all the evidence in the case and after the witnesses for both sides had been permanently excused, which motion was made upon the following grounds and for the following reasons:

* * * * * * *

Third, that the government has failed to prove the matters and things charged in the indictment, and in each count thereof, beyond a reasonable doubt, or by any credible evidence.

Fourth, that there is an insufficiency of the evidence introduced by the government to prove the matters and things charged in the indictment.

Fifth, that there is an insufficiency of the evidence to show that the defendants, or either of them, were guilty of the offense or offenses charged in the indictment, or in any count thereof.

* * * * * * *

The evidence is insufficient in the following particulars:

* * * * * * *

There is no evidence to show that the defendant Edgar Dehne was present in the defendant corporation's store at the time of any of the sales of rubbing alcohol as set forth in the indictment except four sales, namely, at 4:25 P.M. and 5:25 P.M. on March 9th, and 10:20 A.M. and 7 P.M. on March 10th, 1939. Therefore, the evidence will not sustain a verdict, and is insufficient against the defendant Edgar Dehne on the counts wherein other persons besides Dehne made the sales, and on any counts where the sales were made by others than Dehne for failure to have strip or stamp taxes on the bottles of rubbing alcohol. That each of the other times charged in the indictment the evidence shows other employees to have been on duty and to have made the sales.

There was no evidence whatsoever connecting appellant Dehne with any sales except four, namely, those referred to in counts 2, 3, 6, 9, and again in counts 12, 13, 16 and 19 (R. pp. 63-70). It is not even contended nor was there any evidence to show that appellant Dehne was in the store at the time of any sales except the four above referred to, and he was not the proprietor of the store. It is only necessary to state these facts to conclusively show that appellant Dehne should not have been convicted for more than four sales.

THE COURT COMMITTED ERROR IN PERMITTING THE INTRODUCTION OF TESTIMONY INDICATING AT LEAST INFERENTIALLY THAT THE APPELLANTS WERE GUILTY OF VIOLATIONS OTHER THAN THOSE SET FORTH IN THE INDICTMENTS. THE TESTIMONY IN QUESTION DID NOT COME WITHIN ANY OF THE EXCEPTIONS TO THE GENERAL RULE THAT SUCH TESTIMONY IS ORDINARILY INADMISSIBLE, AND ITS ADMISSION UNDOUBTEDLY TENDED TO CREATE PREJUDICE AGAINST THE APPELLANTS IN THE MINDS OF THE JURY.

ASSIGNMENT OF ERROR IV.

That the court erred in admitting the following portion of the testimony of government witness Roy H. Beadle:

"Q. Now, I will ask you about the first of January of this year and up until the 15th of April, what observation, if any, have you made, or what have you seen with reference to the United Cigar Store and the sale, if any, of rubbing alcohol?

Mr. Corette. To which we object on the ground and for the reason it does not tend to prove any

issue in the case, and it is incompetent, irrelevant and immaterial, and does not relate to any of the purchases alleged in the indictment, but merely to general purchases.

The Court. Overruled.

Mr. Corette. Exception noted.

Q. What have you observed, tell us.

A. Why I have observed the traffic at the United Cigar Store, people going in and out, and I have noticed the dehorns and rubbing alcohol drunkards going into the United Cigar Store at different times in my duties on the corner.

Q. And have you noticed them coming out of the store?

A. Yes, I have.

Mr. Corette. The same objection, your Honor, to this entire line of testimony.

The Court. Very well, the objection will be noted to each question.

Mr. Corette. And exception."

The general rule is that in a prosecution for a particular crime, evidence tending to show that the defendant has committed another crime wholly independent of that for which he is on trial, even though it is a crime of the same sort, is irrelevant and inadmissible. There are exceptions to this rule, and such evidence is admissible where it tends to establish a material fact in the particular offense charged or a motive therefor. It is also admissible where a specific intent is a material ingredient of the offense charged or to prove the identity of the defendant.

It is submitted, however, that in the instant case it will appear that the testimony does not come under any of the exceptions. The testimony in question was that of witness Beadle, who testified in substance that he was a police officer stationed for a part of the time on the corner on which the store in which the sales are alleged to have been made is located (R. pp. 109, 110). He said that during the period from January 1st to April 15th, 1939, he had observed "dehorns and rubbing alcohol drunkards" going into and coming out of the cigar store at different times (R. pp. 110, 111), and that he had seen them bringing out rubbing alcohol, sometimes in packages and sometimes unwrapped (R. p. 111). He also said that he had made an arrest of a man who was intoxicated and who had on his person a bottle of Weko Rubbing Alcohol which he further testified was the brand sold at the cigar store in question (R. p. 112).

This was the entire substance of this witness' testimony, and we submit that the testimony was in no way whatsoever connected with the particular offenses charged, namely, specific sales to the government agent, was clearly inadmissible, and did not come within any of the exceptions to the general rule. It should be borne in mind that the appellants were not indicted for maintaining a nuisance or for any general course of conduct, but solely for these specific sales to the government agent.

In the case of *Boyd v. United States,* 142 U. S. 450, 12 S. Ct. 292, 35 L. Ed. 1077, the defendants were

convicted of murder. The trial court admitted evidence as to several robberies committed prior to the day on which the shooting occurred and which had no necessary connection with the issue as to whether the defendants had murdered the decedent. The trial judge instructed the jury that evidence of the other crimes could be considered in passing upon the question of the identity of the defendants, but that the jury should not convict the defendants because of the commission of these other crimes. The Supreme Court held that the admission of this testimony constituted reversible error, stating ((35 L. Ed. at p. 1080):

> "But we are constrained to hold that the evidence as to the Brinson, Mode, and Hall robberies was inadmissible for the identification of the defendants, or for any other purpose whatever, and that the injury done the defendants, in that regard, was not cured by anything contained in the charge. Whether Standley robbed Brinson and Mode, and whether he and Boyd robbed Hall, were matters wholly apart from the inquiry as to the murder of Dansby. They were collateral to the issue to be tried. No notice was given by the indictment of the purpose of the government to introduce proof of them. They afforded no legal presumption or inference as to the particular crime charged. Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community,

> and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. Upon a careful scrutiny of the record we are constrained to hold that, in at least the particulars to which we have adverted, those rules were not observed at the trial below. However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged."

We believe the sole purpose and effect of the testimony of the witness Beadle was to prejudice the appellants with the jurors. Even though this witness did not testify as to the circumstances under which *any* sales were ever made by the appellants, his testimony undoubtedly produced the impression that the appellants were in the habit of selling rubbing alcohol to depraved persons, for illegitimate uses. Again bearing in mind that the appellants were charged only with specific sales to one person, and not with a general course of conduct, this testimony did not in the slightest particular tend to prove any of the issues of the case. It certainly had no logical connection whatsoever with the alleged offenses for which the appellants were on trial and, on the authority of the *Boyd* cases and other cases to which we will refer, was clearly inadmissible. Its harmful effect becomes more apparent when we realize that the only competent evidence of sales which the government introduced dealt with specific sales to the government agent who, we assume the United States Attorney will concede, appeared to be a decent, law-abiding citizen.

In the case of *People v. Girotti,* 67 Cal. App. 399, 227 Pac. 936, the defendant had been indicted for an unlawful sale of liquor. For the purpose of impeaching one of the *People's* witnesses, he introduced into evidence an affidavit used in another action. The district attorney then introduced into evidence the complaint in the other action which charged the unlawful possession of liquor and that the use of the building in question constituted a nuisance. The court held (227 Pac. at p. 937):

> "The admission of the complaint was in violation of the rule that one crime cannot be established by proof of the commission of an independent crime. Its admission was so wide a departure from the rules of evidence and so prejudicial to the rights of the defendant that it cannot be covered by the constitutional mantle of harmless error."

In the case of *People v. Morales,* 45 Cal. App. 553, 188 Pac. 58, the defendant was charged with selling liquor on a particular day. Evidence of sales thereafter was admitted over objection. The court held (188 Pac. at p. 59):

> "Evidence of other offenses committed both before and after that charged against a defendant is sometimes admissible. The cases, however, in which such proof may be made, have been classified by the California courts.
>
> We find that such evidence is admissible when it tends to establish a material fact in the particular offense charged or a motive therefor. (Citing cases.)

> It is admissible also where a specific intent is a material ingredient of the offense charged. (Citing cases.)
>
> It is admissible also where sexual crimes are charged to prove the inclination or lascivious disposition of a defendant. (Citing cases.)
>
> The charge here involved does not fall within either classification adverted to. In fact in similar cases it has been held directly to the contrary. (Citing cases.)
>
> The errors complained of in our opinion were prejudicial to such a degree as to have deprived the defendant of a fair trial."

We submit that in the instant case the testimony in question did not tend in the slightest degree to establish a material fact in connection with the charged sales to the government agent, or a motive therefor. Also, it has been held that specific intent is not a material ingredient of the offense of selling liquor without a license or stamps.

In the case of *State v. Jackson,* 219 Wis. 13, 261 N.W. 732, the trial court allowed proof of sales other than the one charged. This was held to be reversible error, the court stating (261 N.W. at p. 734):

> "Although the defendant strenuously objected to the introduction of such testimony, the court admitted it on the theory that it was competent to show intent. Intent, however, is not an element of selling liquor without stamps or without a license. The admission of such testimony was clearly error and prejudicial if received for the purpose of proving that the defendant was guilty

of the specific charge or charges made against him." (Citing cases.)

As the crimes charged in this case are similar to those of sales of liquor, intent is not an ingredient of these crimes. Therefore, even if it were contended that the testimony in question showed any intent on the part of the appellants, it would be inadmissible.

In the case of *People v. Smith,* 64 Cal. App. 344, 221 Pac. 405, evidence of other sales than those charged was admitted. The court held (221 Pac. at p. 406):

> "While it may be that without such evidence of other sales the case made out against the defendant is strong enough to support the judgment, the great probabilities are that the evidence of other violations of the statute contributed to the verdict if such evidence was not the controlling factor in its inducement. It is a dangerous practice and one which is not in keeping with American ideals to charge a man with one offense and on his trial therefor either to prove or offer to prove that he has at other times and places committed offenses of a nature similar to the one of which he is accused."

In *Hill v. State,* 41 Okla. Crim. Rep. 266, 272 Pac. 490, the trial court allowed proof of other sales than the one charged. The appellate court held this was error, saying (272 Pac. at p. 491):

> "It is fundamental that the issue in a criminal case is single, and it is not the policy of the law to convict an accused of one crime by showing that at some other time he was guilty of another. Where evidence of another crime tends to prove

> the specific crime charged, as where it tends to show a common scheme or plan, or where the crimes are so related to each other that proof of one tends to prove the other or to connect the defendant with the commission of the crime charged, or sheds light on the crime charged or where it tends to show motive or intent or identity, or has some logical connection with the offense charged, proof of another crime is competent."

No common scheme or plan was alleged or proved in the instant case, the sole charges being as to specific sales.

In the case of *Hughes v. State,* 51 Okla. Crim. Rep. 11, 299 Pac. 240, the court held proof of sales other than the one charged was inadmissible, stating (299 Pac. at p. 241):

> "Evidence of an offense other than the one charged is admissible only when it tends to prove the offense charged. To be competent and admissible it must have some logical connection with the offense charged."

We submit that it is obvious that the testimony of Beadle had no logical connection whatsoever with the crimes charged and did not in the slightest degree tend to prove them.

In the case of *McGee v. State,* 24 Ala. A. 124, 131 So. 248, the appellant was charged with violating the state prohibition law, the crime involving the sale of one pint of whisky. The pint in question and three others were exhibited to the jury and the prosecuting attorney was allowed to ask the defendant if he had

not sold liquor to soldiers and boys. The conviction of the defendant was reversed on appeal, the court saying (131 So. at p. 250):

> "The general and well recognized rule is that in a prosecution for a particular offense, evidence tending to show the defendant guilty of another and distinct offense disconnected with the crime charged is inadmissible; the manifest purpose of this rule being to prevent prejudice to the defendant in the minds of the jury by the introduction in evidence of offenses for which he is not indicted, to which he is not finally to answer, and building up a conviction on inferences of guilt from the fact that he had committed another offense. The justice, fairness and reason for the rule is apparent, and as said in the case of Gassenheimer v. State, 52 Ala. 313, 'a strict adherence to it is necessary to prevent criminal prosecutions from becoming instruments of oppression and injustice.' "

There should have been the desired "strict adherence" to the rule in this case to prevent the obvious prejudice to the appellants in the minds of the jury. That this prejudice was created is shown conclusively by the fact that the appellant Dehne was convicted on every count, involving ten separate sales, though the government's own testimony showed that he made and was present at only four of these ten sales, and did not show that he instructed the other clerks to make the other sales.

The case of *Coulston v. United States,* 51 Fed. (2d) 178, was a prosecution for violation of the Harrison Anti-Narcotic Act, 21 U.S.C.A. 171, et seq. The trial

court permitted testimony as to sales other than the one charged. The court held (pp. 180-181):

> "In our judgment, this was prejudicial error. The issue presented was a simple one: Did defendant negotiate the sale on January 20, 1929, as testified to by two government witnesses, or was he an innocent bystander, as he testified. These remote and disconnected transactions had no evidentiary bearing on this issue; at best they could serve but to create an atmosphere of hostility and to distract the attention of the jury from the issue. The briefs indicate a confusion of thought upon two entirely different evidentiary principles—one the admissibility of proof of other offenses; the other, the impeachment of the defendant as a witness if he takes the stand. In the civil law, and very early in the common law, evidence of other crimes was admitted on the theory that a person who has committed one crime is apt to commit another. The inference is so slight, the unfairness to the defendant so manifest, the difficulty and delay attendant upon trying several cases at one time so great, and the confusion of the jury so likely, that for more than two hundred years it has been the rule that evidence of other crimes is not admissible. Boyd v. United States, 142 U.S. 450, 12 S. Ct. 292, 35 L. Ed. 1077; Hall v. United States, 150 U.S. 76, 14 S. Ct. 22, 37 L. Ed. 1003; Niederluecke v. United States (C.C.A. 8), 21 F. (2d) 511; Cuccia v. United States (C.C.A. 5), 17 F. (2d) 86; Smith v. United States (C.C.A. 9), 10 F. (2d) 787; Wigmore on Evidence (2d Ed.), Sec. 194. Corpus Juris cites cases from forty-four American jurisdictions in support of this rule. 16 C.J. 586. There are many exceptions to the rule, the most

common of which is that, if the prosecution must show a specific intent, evidence of other similar offenses may be used to establish that fact. For example, in a prosecution for a scheme to defraud, the existence of the crime depends upon the proof of fraudulent intent; and many times the proof of that intent is found in the 'evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment.' Wood v. United States, 41 U.S. (16 Pet.) 342, 360, 10 L. Ed. 987; Williamson v. United States, 207 U.S. 425, 28 S.Ct. 163, 52 L.Ed. 278; Wigmore on Evidence (2d Ed.) Secs. 300-373; 16 C.J. 589. All of the many so-called exceptions to the general rule of exclusion can be covered by stating the rule negatively; that is, relevant and competent evidence of guilt is not rendered inadmissible because it also proves that defendant committed another offense. Moore v. United States, 150 U.S. 57, 61, 14 S.Ct. 26, 37 L. Ed. 996; Tucker v. United States (C.C.A. 6), 224 F. 833; Hogan v. United States (C.C.A. 5), 48 F. (2d) 516; Miller v. United States (C.C.A. 9), 47 F. (2d) 120. Or, to use the language of Justice Brewer, 'A party cannot, by multiplying his crimes, diminish the volume of competent testimony against him.' State v. Adams, 20 Kan. 311, 319.

The government was not obligated to show any specific intent in the case at bar. In Paris v. United States (C.C.A. 8), 260 F. 529, the defendants were charged with a violation of the Anti-Narcotic Act, and the cause was reversed because evidence of other violations of the act was admitted, the court holding that 'the intent of the

> defendants, or either of them, was not an essential element of the offense with which they were charged in the case at bar.' The evidence offered by the government in this case had no probative bearing on the guilt of the defendant, and should have been excluded."

The case of *Grantello v. United States,* 3 Fed. (2d) 117, was also for a violation of the Harrison Anti-Narcotic Act. The trial court permitted the introduction of testimony showing other sales than those charged, these other sales being made at about the same time as the ones charged. The court held that the admission of this testimony was reversible error, stating (p. 119):

> "* * * He was not charged in the indictment with any of the sales, possessions, or offenses about which Gunderson and Prewitt testified, nor was he on trial for any thereof. They were in no way connected with any of the offenses charged in the indictment, and no question of the intent of the defendant was material or in issue in this case. It is neither competent, fair, nor just to a defendant to receive evidence against him of like offenses to those charged in the indictment under which he is on trial, where no question of his intent is in issue, and no connection between such offenses and those charged is proved. Marshall v. United States, 197 F. 511, 513, 515, 117 C.C.A. 65; Scheinberg v. United States, 213 F. 757, 760, 130 C.C.A. 271, Ann. Cas. 1914D, 1258; Fish v. United States, 215 F. 544, 551, 552, 132 C.C.A. 56, L.R.A. 1915A, 809."

See also:

People v. Garrett, 93 Cal. App. 77, 268 Pac. 1071;

People v. Mori, 67 Cal. App. 442, 227 Pac. 629;

People v. Wilson, 19 Cal. App. (2d) 340, 65 Pac. (2d) 834;

Hall v. Commonwealth, 241 Ky. 72, 43 S.W. (2d) 346;

Wimpling v. State, 171 Md. 362, 189 Atl. 248;

State v. Maddox, 339 Mo. 840, 98 S.W. (2d) 535;

People v. Johnson, 197 N.Y. Supp. 379;

State v. Beam, 179 N. Car. 768, 103 S.E. 370;

Burke v. State, 135 Tex. Crim. App. Rep. 296, 120 S.W. (2d) 95;

Coleman v. State, 123 Tex. Crim. App. Rep. 621, 57 S.W. (2d) 162;

Grohoske v. State, 121 Tex. Crim. App. Rep. 352, 50 S.W. (2d) 310;

Alexander v. State, 24 Okla. Crim. Rep. 435, 218 Pac. 543.

CONCLUSION.

We have shown that there was no violation of the regulation in question, and therefore the appellants should not have been convicted on any of the counts of the indictment. We believe it is obvious that the court committed error in the admission of testimony, and that this error is the sole cause of the verdict of

the jury. The prejudice caused by the testimony in question is conclusively shown by the fact that the jury convicted appellant Dehne for sales in which he was in no way involved.

Even if there had been competent testimony, the sentences imposed on the defendants were excessive. We respectfully submit that the judgment should be reversed.

Dated, San Francisco, California,
February 26, 1940.

JESSE H. STEINHART,
JOHN J. GOLDBERG,
Attorneys for Appellants.

CORETTE & CORETTE,
ROBERT D. CORETTE,
WILLIAM A. DAVENPORT,
Of Counsel.

No. 9397

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED CIGAR WHELAN STORES CORPORATION, a Corporation, and EDGAR DEHNE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

JOHN B. TANSIL,
United States Attorney for the District of Montana, Billings, Montana.

R. LEWIS BROWN,
Assistant United States Attorney for the District of Montana, Butte, Montana.

Attorneys for Appellee.

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CITATIONS

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellants were charged by indictment with carrying on the business of retail liquor dealer, selling denatured alcohol in violation of law and Treasury Regulation No. 3, as amended, and for the sale of denatured alcohol for beverage purposes when the immediate containers did not have affixed thereto the required strip stamp, and for possessing the alcohol with intent to sell.

The evidence disclosed that the corporate appellant carried on the business in Butte, Montana, in a small storeroom or building approximately twenty feet long and twelve feet wide (R. 92); that the appellant Dehne had

been manager for 12 years (R. 143); that one clerk was employed regularly and one relief clerk employed (R. 143) and that Dehne, himself, acted as clerk and there was only one clerk on duty at a time (R. 143). That for sometime prior to January 12, 1939, the appellants had been selling rubbing alcohol for beverage purposes with no restrictions whatsoever (R. 59 and 187). The government officers, becoming aware of this business, on June 14, 1938, entered the store, gave the appellant Dehne a copy of the regulation, read it to him, and warned him to discontinue the practice of selling for beverage purposes and to drunks and dehorners (R. 83). (Dehorner is one that drinks rubbing alcohol) (R. 114). Again on January 2, 1939, the officers of the government went into the place of business of the appellants and warned them to cease the practice of selling this alcohol for beverage purposes (R. 83, 57-59). The appellant Dehne replied that he received the alcohol from the company's headquarters in San Francisco and that so long as they continued to send it to him he would sell it to anyone who came in and asked for it (R. 59, 84, 85 and 148). Dehne testified (R. 158) that it was his duty as manager to sell anything the company shipped him to sell. If they instructed him something was illegitimate to sell, he would not sell it, but that instructions by the Internal Revenue Agents that it was illegitimate to sell any article would not control his action.

The appellants have been selling in this store 144 bottles a week of rubbing alcohol. The owners and managers of various drug stores, some on the same street and some in the same block as the appellants' store, testified as to their sales of rubbing alcohol. The manager of the largest drug store testified their sales of rubbing alcohol ran

from 24 to 36 bottles a week (R. 104); another druggist's average sales were 18 a week (R. 115); another between 24 and 30 bottles a week (R. 119); another between 18 and 24 bottles a week (R. 123). A police officer of the City of Butte, who was stationed in front of the store, testified that between January 1, 1939, to the 15th of April, 1939, he had observed dehorners and rubbing alcohol drunkards going into and coming out of the place of business of appellants bringing out with them rubbing alcohol, sometimes wrapped and sometimes unwrapped (R. 110).

The government officers having information that the appellants were continuing to carry on the business, designated Julius Johnson, an officer of the Alcohol Tax Unit, to investigate (R. 81). In the progress of his investigation he dressed in such a way as to simulate a bum and entered the store to make purchases of alcohol. He first went into the store on the 9th of March, 1939, and bought a pint of alcohol from Dehne. An hour later he walked back and bought another pint from Dehne. Two hours later he walked back and bought another pint from the other clerk. An hour later he went in and bought another pint from the same clerk. The next morning in the forenoon he walked in and bought another pint from Dehne. Two hours later he walked in and bought another pint from Varco, asking both for another bottle of alcohol. Five hours later he walked in and bought another pint from the same clerk. Two hours later he went in and purchased another pint from the appellant Dehne, asking for another bottle of alcohol. He purchased eight pints in twenty-four hours (R. 63 to 68). On the 15th of April, 1939, in the morning, he went into the store and asked the clerk Maenpa for a pint of alcohol. When the clerk com-

menced to wrap it he asked him if he didn't have the other brand; that he liked the other brand to drink better than he did the one that the clerk was wrapping and the clerk responded no that was all he had and the agent said that was all right, he could drink it (R. 69, 70). About an hour and a half later he went back into the store, found the same clerk on duty and asked for four pints of alcohol, saying that the other pint didn't last long with four or five of them drinking out of it (R. 70). It is undisputed that the $25 stamp, required of retail liquor dealers, was not purchased or displayed in the building, nor did any of the bottles have any strip stamp on them.

I.

ARGUMENT.

THE EVIDENCE JUSTIFIES THE VERDICT OF THE JURY AND THE JUDGMENT OF THE COURT, FINDING THE APPELLANTS AND EACH OF THEM GUILTY OF THE OFFENSES SET OUT IN THE INDICTMENT.

Appellants contend that the evidence was insufficient to justify the verdict of the jury or the judgment of the court, in that there was no evidence produced that the purchaser, the government agent, of the rubbing alcohol intended to, or did use the purchased alcohol for beverage purposes, and without such intent on the part of the purchaser no violation of law was established, irrespective of the intent of the appellants, the sellers.

SUFFICIENCY OF THE EVIDENCE.

That the government established beyond any reasonable doubt that the appellants were carrying on the business

of retail liquor dealer by selling its denatured alcohol for beverage purposes prior to the 9th of March, 1939, cannot be disputed. This appears from the uncontradicted testimony of the agent when he informed Dehne that alcohol was being diverted for beverage purposes and he said he was aware of that (R. 59). It appears further from the statement of Dehne given to the agents (R. 96, Exhibit 16) where he says he has quit selling rubbing alcohol to anyone he thinks is buying it for beverage purposes. It is obvious that he could not quit selling it for beverage purposes unless he had theretofore been selling it for those purposes. It appears further from the statement of the clerk Varco (R. 99, Exhibit 17) where he said that he told the agent that in the future he would refuse to sell rubbing alcohol to any person whom he believed was buying it to drink. Each of them, in their statements, said that they did not sell to repeaters and defined repeaters as the same customer more than once in two or three days. It appears further in Dehne's testimony where he said he intended to continue selling rubbing alcohol as long as the corporate appellant supplied it to him to sell, but that he had cut down in selling to drunkards and dehorners (R. 149). That as manager it was his duty to sell anything the corporate appellant sent him to sell; that he intended to sell what it sent him to sell unless it told him it was illegitimate to do so, and irrespective of the statements or warning in that regard of Internal Revenue Agents (R. 158). Clerk Varco testified that after the warning of January it was talked over by Dehne, himself and the other clerk and they decided not to sell to those they figured were using it for illegitimate purposes (R. 183). Pregnant with the admission, before

that they were selling to those they thought were using it for illegitimate purposes, and again at page 187 Varco specifically testifies that prior to that time they sold to those that looked like they had been drinking it, or wanted to drink it, or were not going to use it for legitimate purposes. A police officer testified that continuously from January to April 15th the place was frequented by alcohol drunkards purchasing this rubbing alcohol (R. 110, 111). The government agent testified that just before January 12, he talked to a man who had been arrested and was just sobering up from a drunk. The police had taken a bottle of alcohol from him that he said he purchased from the store of the corporate appellant. (R. 161, 162). From the statement of the appellant Dehne and the clerks it is apparent that in selling the alcohol they made no inquiries of the individuals they sold to, made no effort to determine what purpose the alcohol was needed, or desired by them, used no care in its sale and sold it indiscriminately to any person who came in and desired it for any purpose.

The appellants' defense was not that they had not been engaged in the business, but that they quit the business prior to March 9th. This the evidence conclusively disproves. The evidence conclusively shows that they used no more precaution, made no more inquiries after March 9th than they did prior to March 9th. The testimony of the police officer shows that continuously from January to April 15th the place was frequented by drinkers of rubbing alcohol who purchased it there. The quantity of alcohol sold, as compared with that sold by legitimate drug stores in the City of Butte, shows that it was sold for purposes other than legitimate use. The statements given

by Varco, the clerk, and Dehne that they would in the future use precautions and not sell to repeaters, that is more than one bottle to the same customer in two or three days, is absolutely refuted by the fact that they did sell to Julius Johnson. The testimony of Julius Johnson is undisputed that he went in and made numerous and frequent purchases from Dehne and the other clerks without inquiries being made of him whatsoever as to why he needed alcohol, or needed so much alcohol, or what his use or intended use of it was.

In the face of such evidence the contention of the appellants, that between March 9 and April 15 they had ceased to carry on the business they admittedly theretofore had carried on, is incredible and the jury properly refused to accept the explanation.

NEITHER THE ACTS OF CONGRESS, NOR THE TREASURY REGULATION REQUIRES PROOF OF THE ACTUAL USE BY THE PURCHASER, OR INTENDED USE BY HIM, OF DENATURED ALCOHOL FOR BEVERAGE PURPOSES TO SUSTAIN A CONVICTION.

The appellants urge that as neither Julius Johnson, the government agent, nor anyone else intended to or did use the rubbing alcohol purchased, for beverage purposes, the evidence is insufficient to sustain a conviction.

Appellants have overlooked the testimony of the agent, on cross-examination, that in January, 1939, he had been in the city jail and talked to one incarcerated there for drunkenness, from whom the police had taken a bottle containing rubbing alcohol, and who said he had

purchased it from the store of the corporate appellant, and further overlooked the testimony of the police officer who testified as to rubbing alcohol users frequenting the store and purchasing alcohol and that he knew they were rubbing alcohol users because he had seen them drinking it and arrested them for it (R. 113).

The appellants seek to confine the evidence on behalf of the government, the evidence of Julius Johnson alone, the government agent, who testified that he did not purchase the rubbing alcohol to drink, but purchased it for evidence.

The appellants take the position that the law is, that unless the purchaser intends, at the time he purchases the alcohol, to use it for beverage purposes and does use it for beverage purposes, the intention of the seller to sell it for beverage purposes, and who actually sells it for beverage purposes, is immaterial and the sale by the seller for beverage purposes does not constitute a violation either of the applicable statutes or of the Treasury Regulation. Each case must of necessity depend upon its own particular facts.

Here the appellants were charged with carrying on the business of a retail liquor dealer without the purchase of the stamp required. Section 1397a, Title 26, Section 2803a I. R. C. and 3253 I. R. C. prohibits the carrying on of the business of retail liquor dealer without first paying the special tax. Section 3250 I. R. C. fixes the tax in the amount of $25.00 and Section 3254c I. R. C. defines retail dealer in liquors as one selling in quantities less than five wine-gallons to the same person at the same time.

The evidence of Julius Johnson was material and competent to be considered with the other evidence to prove

the business that was being carried on and the manner and method of carrying it on, irrespective of his intent with reference to the alcohol after he obtained it. The effort of Julius Johnson was to ascertain, if possible, the conditions under which and the purpose for which the appellants would sell rubbing alcohol, and the testimony of Johnson was material to go to the jury, as to whether or not it was the course of business of appellants to sell rubbing alcohol for beverage purposes, in light of the testimony of the police officer that known alcohol drunkards and users of alcohol for beverage purposes frequented the place of business of the corporate appellant and purchased alcohol from it. Certainly the jury could legitimately believe that if the appellants sold rubbing alcohol to Julius Johnson to drink, they would sell rubbing alcohol to anyone else purchasing it and intending to drink it.

REGULATION ARTICLE 146-A, No. 3.

Article 146-A, Regulation No. 3, where pertinent, reads as follows:

> "No person shall sell denatured alcohol * * * under circumstances from which he might reasonably deduce that it is the intention of the purchaser to produce the same for use for beverage purposes."

Section 151, Title 27, Sub-division 6, enacted August 27, 1935, a part of the liquor law repeal and enforcement act authorizes the Commissioner, with the approval of the Secretary of the Treasury, to prescribe regulations for carrying out the provisions of Chapter 3 of the Title.

The regulations, when promulgated, have the force and effect of law.

U. S. v. George, 228 U. S. 14;
U. S. v. Antikamnia Chem. Co., 231 U. S. 654;
Maryland Casualty Co. v. U. S., 251 U. S. 342;
Montana Eastern Ltd. v. U. S., 95 Fed. (2d) 897.

Section 153 of Title 27, provides:

> "Any person who shall * * * sell denatured alcohol * * * in violation of laws or regulations, now or hereafter in force, pertaining thereto, and such denatured alcohol * * * shall be subject to all provisions of law pertaining to alcohol that is not denatured, including those requiring the payment of tax thereon; and the persons so * * * selling the denatured alcohol shall be required to pay such tax."

This statute was enacted likewise August 27, 1935.

Manifestly, from these statutes, the intent of Congress was that denatured alcohol should not be sold for beverage purposes, tax free.

Appellants contend that there can be no violation of this regulation and Section 153, where the seller sells for beverage purposes, unless the purchaser purchases the alcohol for beverage purposes, intends to drink it, and actually drinks it.

Th fallacy of appellants' argument is that the regulation does not so provide. Nothing is said in the regulation about the intent of the purchaser. The prohibition is against the seller selling and not against the buyer buying.

The language of the regulation is plain, unambiguous and easily understood. Had it been the intent of the regulation to have made the violation depend upon the actual intended use, by the buyer of the alcohol, no doubt such intent would have been expressed in the regulation in language disclosing it. Had it so read, there might have been a basis for appellants' contention, but not so

reading, no other construction can be placed upon the regulation except that the violation is accomplished solely by the act of the seller in selling. Any other result would not be construction, but would be amendment by construction.

Appellants assert that the case of Sherman v. U. S., 10 Fed. (2d) 17, by the Circuit Court of Appeals for the Sixth Circuit, is authority sustaining their position. In that case the defendant was indicted for the sale of a four-ounce bottle of Jamica ginger.

As we read the decision the Court did not construe any regulation whatsoever, but did construe Section 13 of Title 27, U. S. C., a part of the National Prohibition Act.

From the opinion of the Court there is no fact similarity whatsoever between the Sherman case and the case at bar. Each case must of necessity depend upon its own particular facts.

In considering that case it must be borne in mind that the prosecution was for a violation of the National Prohibition Act, not for a violation of the revenue statutes. The statutes there considered by the Circuit Court were statutes enacted under National Prohibition Acts and not revenue statutes.

The Court holds that Jamaica ginger was a medicinal preparation not within the ordinary definition of intoxicating liquor, and that under Section 13 Jamaica ginger was exempted wholly from the operation of the National Prohibition Act.

It cannot be contended that alcohol is not within the ordinary definition of intoxicating liquor. Under Section 13, there was a distinction made between denatured alcohol and Jamaica ginger. Denatured alcohol is treat-

ed under sub-division (a) of the Section, and provided that it was exempt only when produced and used as provided by laws and regulations, now or hereafter in force. The only use the seller could make of denatured alcohol is to sell it.

The Court there determined that the purpose for which Section 13 was enacted was to prevent intoxication, saying:

> "We think the ultimate thing at which this part of section 4 was aimed was such intoxication as might be caused through the purchase of these preparations by one who intended to use them to drink."

Believing as the Court did that the purpose of the statute was to prevent intoxication and knowing that there could not be intoxication unless the consumer consumed the intoxicant sold to him, it gave to the section the construction it believed would effectually carry out the purpose for which the statute was passed.

However, here a different situation confronts the Court. The prosecution is not for enforcement of any prohibition act; it is for enforcement of the revenue acts. The prosecution is not to punish one for causing intoxication, but to punish one for a fraud on the revenue of the United States. Both Section 153 and the Regulation were passed after the repeal of the National Prohibition Act, and were passed specifically for the purpose of protecting the revenue. Thus the purpose of the regulation was entirely different from the purpose of Section 13, and a construction given to Section 13 to carry out the intent of Congress and gain the purpose sought to be gained by that section, would not carry out the purpose to be gained by the regulation before the Court, but would effectually

nullify it. This is particularly true when Section 153 is considered, for that Section specifically provides that the seller must pay the revenue. No mention is made in that section of the purchaser and no burden is placed on him to pay the revenue, and the regulation was specifically passed in aid of and in the enforcement of that section. Under Section 13, as construed by the Court, no intoxication could possibly ensue unless the purchaser consumed the intoxicant sold, thus his act was necessary to defeat the purpose of the statute. However, here, if the seller sells for beverage purposes, the purpose of the act is defeated irrespective of whether the purchaser drinks or not.

The Court there said it to be contrary to the general principals of criminal law that the mere intent to violate the law, not followed by actual violation, should be a crime. Such situation does not, under the facts of the case and under the regulation, appear hre, for the intent to do the act, that is to sell for beverage purposes, coupled with an actual sale by the seller for that purpose, constitutes the crime, or actual violation. The seller intended to and actually did what the regulation prohibited, and in so doing it is more than a mere intention, but constitutes the actual violation.

If, however, the decision of the Circuit Court of Appeals of the Sixth Circuit is authority in that Circut for the contention made by the appellants, it is not authority in this Circuit, as under the facts of this case the law of it is controlled by the decision of this Court in

Burnstein v. U. S., 55 Fed. (2d) 599,

It is undisputed that in this case the denatured alcohol was sold by the appellants indiscriminately, without any inquiries being made, without any questions being asked

and in whatever quantity the purchaser asked for. If it is said that rubbing alcohol is a medicinal preparation, then certainly the appellants did not ascertain from what ailment any of its customers were suffering from, whether they were sick or in need of medicine, or that the appellants knew the medicinal value thereof, if any, or what the medicine was good for.

In the Burnstein case the appellants were convicted of selling nine drinks of a medicinal preparation known as Margo Bitters, containing about 47% alcohol by volume.

This Court, in affirming the conviction said:

> "The appellants do not claim that they made any effort to determine whether or not the persons who purchased bitters from them were sick or in need of medicine. They did not ascertain from what ailment they were suffering and there is no evidence that they knew the medicinal value thereof, if any. There is no effort to determine the proper amount of bitters to be administered for the particular ailment with which the purchasers were afflicted."

The liquor here contained 73½% of alcohol.

Under the appellants' contention, if accepted, one could sell rubbing alcohol to the general public for beverage purposes indiscriminately, without the payment of tax and carry on such business without fear of punishment, for if an agent, seeking to enforce the revenue act, went into the place of business and purchased alcohol in the regular course of the business as carried on by such individual and under identical circumstances as those who were purchasing it for beverage purposes, even where the officer tells the seller that he desires it for beverage purposes, such evidence would not establish any violation of law because, as a matter of fact, the officer was acting

in the performance of his duties and was purchasing the alcohol for evidence and not to actually drink. Neither would the government's case be strengthened under their theory if the officer opened the bottle and took a drink because it would and could be contended that the taking of the drink was simply a subterfuge and was for the purpose of obtaining evidence and not for the real purpose of consuming the alcohol as a beverage. Appellants here go further and contend that the officer's testimony cannot even be accepted to establish the general course of business of one engaged in such business.

The Circuit Court of Appeals of the Fourth Circuit in

Massei v. U. S., 295 Fed. 683,

came to an opposite conclusion from the Circuit Court of Appeals of the Sixth Circuit in the Sherman case in construing the identical statutes, the Court there saying:

> "When the defendant sold it under circumstances from which he could reasonably deduce that the purchaser intended to use it for beverage purposes, he committed the offense of selling intoxicating liquor for such purposes, precisely as he would have done had it been whiskey, gin or brandy, and was equally liable to imprisonment as a punishment therefor."

We submit that such is not the law and that the regulation should not be construed in such a way as to effectually nullify it as contended by appellants. That if such is the effect of the decision of the Circuit Court of Appeals of the Sixth Circuit in the case of Sherman v. United States, that this Court has laid down a different rule in the case of Burnstein v. United States, and that under the rule as laid down by this Court in that case, the evidence is amply sufficient to sustain the verdict of the jury and the judgment of the Court.

II.

APPELLANTS' ASSIGNMENTS OF ERROR II AND VI.

ASSIGNMENTS OF ERROR II AND VI ARE NOT AVAILABLE TO APPELLANTS HERE BECAUSE OF LACK OF ANY PROPER FOUNDATION IN THE RECORD.

By assignments of error II and VI the appellants complain of the action of the trial court in overruling the motion of the appellants for a directed verdict in their favor and a verdict of acquittal and to dismiss the action at the close of all of the evidence.

In argument the appellants assert that the evidence is insufficient to sustain the verdict and judgment on any counts except possibly those arising out of the last two sales made on April 15, 1939. When the record is examined it appears that at the close of the government's case in chief the appellants made a joint motion that the Court direct a verdict in their favor of not guilty and for dismissal of the action upon the grounds, among others, that the government had failed to prove the matters charged in the indictment, and in each count, beyond a reasonable doubt, insufficiency of the evidence to prove the matters and things charged in the indictment and insufficiency of the evidence to show the appellants, or either of them, were guilty of the offense or offenses charged in the indictment, or any count thereof (R. 140). At the close of all of the evidence the appellants requested that the same motion be considered as made. The Court considered it made and denied and exception was noted.

The motion amounted to a general motion and under

it the appellants requested the Court jointly to direct the jury to return a verdict of not guilty on all counts. No motion was made by the appellants, either separately or jointly, for a direction of verdict of not guilty by the Court as to any particular count. The motion was for a verdict of not guilty as to all counts and this motion the Court denied. The Court was correct in denying the motion made to it.

The motion being joint, it must have been good as to both appellants before it could have been sustained.

Condic, et al. c. U. S., 90 Fed. (2d) 786.

If there was sufficient evidence to go before the jury as to any count, the Court properly denied the motion as made.

Matters v. U. S., 261 Fed. 826.

Appellants, in their argument, impliedly concede that there was evidence sufficient to go to the jury as to certain counts of the indictment, namely, as to the sales made by the clerk Maenpa, and by this concession the appellants acknowledge that the motion as to those counts was not good. This concession, we believe, without question, demonstrates that the action of the trial court in overruling the motion as made was correct. Again, the Court charged the jury that under the evidence they had a right to find the appellants guilty on all counts, or not guilty on all counts, or guilty on some counts and not guilty on the others (R. 202, 218). The appellants took no exception to the charge of the Court (R. 220).

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR A VERDICT OF ACQUITTAL.

Having heretofore detailed the evidence we shall not do so again. Julius N. Johnson testified as to the sales made to him. He was not the only witness to the sales, as the appellant Dehne was a witness to some of them and the other clerks were witnesses to other of the sales and they did not testify as to the sales to Johnson and did not contradict his testimony in any respect whatsoever. However, the evidence of the government in support of each of the counts of the indictment was not confined to the testimony of Julius Johnson, but numerous witnesses testified and there was a great deal of evidence produced by the government in support of the charges made against the appellants. The method and manner in which the appellants carried on their business as a retail liquor dealer without paying the tax was all evidence competent to go to the jury to be considered with the testimony of Julius Johnson in support of the counts in the indictment which charged the sale of alcohol to him and the sale of alcohol to him in unstamped containers. This Court has held that if there is any "legal, competent, or substantial" evidence sustaining the charge it should be submitted to the jury,

Maugeri v. U. S., 80 Fed. (2d) 199,

and it cannot be gainsaid that there was competent and substantial evidence to sustain the indictment. The weight of the evidence or the question of guilt or innocence is for the jury after considering all of the evidence submitted to it.

This Court has said that its function on appeal was not

to weigh the evidence, or even be convinced itself beyond a reasonable doubt that a defendant is guilty, that its only duty is to declare whether the jury had a right to pass on what evidence there was.

Craig v. U. S., 81 Fed. (2d) 816.

We respectfully submit that the assignments of error are without merit and that no error was committed by the trial court in the ruling complained of.

III.

APPELLANTS' CONTENTION THAT THE IMPOSITION OF SENTENCE ON EACH COUNT OF THE INDICTMENT CONSTITUTES DOUBLE PUNISHMENT CANNOT BE CONSIDERED.

The appellants urge that the Court, in sentencing on each of counts two to eleven inclusive, and on counts twelve to twenty-one inclusive, and on count twenty-two, punished the appellants twice for the same offense and, therefore, committed error.

The question is not properly before the Court and cannot be considered by it. The record of the trial of the case is barren of any suggestion, on behalf of the appellants, that the offenses charged in counts two to eleven inclusive were the same as the offenses charged in counts twelve to twenty-one inclusive, and in count twenty-two, and that any verdict of guilty by the jury would be convicting the appellants twice for the same offense, or any imposition of judgment by the Court would be a double punishment for the first offense. The question was not in any wise raised or presented to the Court. Neither was the action of the trial court, in sentencing as it did, specified by the appellants as error in their specifications

filed herein. At page 7 of their brief appellants set forth the assignments that they intend to rely upon, with appropriate references to the transcript page where found, and a reading of those errors disclose that the action of the trial court, here sought to be revealed, was not assigned as error.

Under such circumstances the action of the trial court cannot be reviewed by this Court and there is nothing before this Court in that regard.

Baldwin v. U. S., 72 Fed. (2d) 810;
Alberty v. U. S., 91 Fed (2d) 461;
Pruett v. U. S., 3 Fed. (2d) 353.

THE SENTENCE OF THE TRIAL COURT DID NOT CONSTITUTE DOUBLE PUNISHMENT.

Counts two to eleven charged the sale of denatured alcohol in violation of the Treasury Regulation. Counts twelve to twenty-one charged the sale of denatured alcohol, the containers of which did not have the strip stamp affixed thereto, and count twenty-two charges the possession of denatured alcohol with intent to sell it.

Under the Treasury Regulation it was a violation to sell the denatured alcohol for beverage purposes, and that without regard to whether the sale was made in containers having a strip stamp affixed thereto or not. Section 1152a, Title 26, re-enacted Sec. 2803 of R. C. makes it unlawful to sell distilled spirits unless the immediate container has affixed thereto the stamp provided for in the section.

The fact is that the sale was made in unstamped containers.

This Court in

King v. U. S., 31 Fed. (2d) 17;
Affirmed 280 U. S. 521;

said the test was as to identical offenses; that the offense must be the same in law and in fact; that the plea is not good if the offenses be distinct in law, however nearly they may be connected in fact.

The Court again said that the test of identity is whether the same evidence is required to sustain both. If not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by statute.

Macklin v. U. S., 79 Fed. (2d) 756.

Applying these tests, it is clear that the Court did not err. Under counts two to eleven inclusive, the charge there was the sale of alcohol for beverage purposes. It was not an element of the offense charged and neither was any proof required, to sustain a conviction, to establish whether or not the immediate container had affixed thereto the strip stamp required by statute. Any such evidence as offered would have been entirely immaterial and properly rejected by the trial court.

The charge in counts twelve to twenty-one inclusive, was the sale of the alcohol in immediate containers on which no stamp was affixed. Here it became necessary to prove another and additional element in order to sustain a conviction; that is, not only the sale of denatured alcohol, but that it was in a container upon which no strip stamp was affixed, and the proof required to sustain a conviction under counts two to eleven inclusive would not sustain a conviction under counts twelve to twenty-one inclusive.

Likewise, with count twenty-two, charging possession with intent to sell. In order to sustain a conviction under that count, it would not be necessary to prove an actual sale, whereas to sustain a conviction on counts two to twenty-one inclusive, it was an essential ingredient of the offense to prove an actual sale and a conviction could not be had without such proof.

In

Remaley v. Swope, 100 Fed. (2d) 31,

this Court held that the offense of carrying on the business of a distiller without giving bond was separate and distinct from that of making and fermenting mash, wort or wash fit for distillation, or for the production of spirits or alcohol in a business or premises other than a distillery duly authorized according to law.

Judge Cavanaugh of the United States District Court of Idaho held that the unlawful possession of intoxicating liquor and transportation thereof are two separate and distinct offenses.

U. S. v. One Oldsmobile Coupe, 22 Fed. (2d) 441.

This Court again asserted the test was whether or not the same evidence is required to sustain the various charges.

Ross v. U. S. 103 Fed. (2d) 600.

In the Ross case this Court said that it had specifically declined to follow the case of Cain v. U. S., 19 Fed. (2d) 472, cited and relied upon by the appellants in their brief. The case of Nelson v. U. S., 131 U. S. 176, cited and relied upon by the appellants here, was likewise cited and relied upon by the appellant in the Ross case.

IV.

APPELLANT DEHNE PROPERLY CONVICTED OF CARRYING ON THE BUSINESS OF RETAIL LIQUOR DEALER.

Appellant Dehne asserts the Court erred in sentencing him on count one, for carrying on the business of retail liquor dealer, as he was merely an employee and could not carry on such business.

The assignment of error is not properly before the Court. The argument is made under assignment of error VI, and the assignment of error is that the Court erred in denying and overruling the motion of the United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne for a directed verdict of not guilty.

The record discloses that a joint motion was made by both appellants for a verdict of not guilty. Being joint it must be good as to all, or must be denied by the trial court.

Condic v. U. S., 90 Fed. (2d) 786.

Obviously the motion was not good as to the corporate appellant, the argument made on behalf of Dehne being that the corporate appellant owned the business and it alone could carry it on. This contention is one that could only be made by Dehne and is not common as to both appellants. In order to have properly presented it to the trial court, Dehne should have made a separate motion on that ground. Failing to do so, in ffect he is in the position of a defendant who, at the close of all of the evidence, fails to move the Court for a directed verdict and cannot thereafter raise the point.

Girson v. U. S., 88 Fed. (2d) 358.

Further, the Court charged that under the evidence Dehne could be convicted on that count, or acquitted on that count, as the jury viewed the evidence, and no exception was taken to the charge.

DEHNE WAS PROPERLY CONVICTED ON COUNT ONE.

It is true that Dehne had no proprietary interest in the business. He, however, was something more than a mere employee. The United Cigar Whelan Stores Corporation, being a corporation, could act only through responsible agents. He was the manager of the store and its most responsible agent in the store. He directed the course of business, directed the actions of the clerks, ordered the alcohol that was sold and participated in its sale.

Section 550 of Title 18, U. S. C., defines a principal as "whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission is a principal."

Appellants cite the case of Anderson v. U. S., 30 Fed. (2d) 485, from the Fifth Circuit, as holding that an employee cannot be an accomplice and, therefore, a principal in conducting a business unless he is one of the proprietors. If this case so holds, its holding is not only against the weight of authority, but is specifically against the rule as announced by this Court.

In

> Vukich v. U. S., 28 Fed. (2d) 666,
> Certiorari denied, 297 U. S. 847,

the defendant was indicted for carrying on the business

of a distiller without having given bond as required by law. The trial court was requested to charge the jury that before a conviction could be had they must find, beyond a reasonable doubt, that the defendant was either the proprietor of the business, or had a proprietary interest in it. The Court refused to give this instruction. On appeal this Court held that one who aids, and abets the carrying on of an unlawful business is liable as a principal, and need have no proprietary interest in the busness, and affirmed the action of the trial court. This holding was reaffirmed by this Court in

Cvitkovic, et al., v. U. S., 41 Fed. (2d) 682;
Borgia v. U. S., 78 Fed. (2d) 550.

The Vukich case, supra, was cited with approval in that respect and followed by the Circuit Court of Appeals of the Eighth Circuit in

Parent v. U. S.;
Antinoro v. U. S., 82 Fed. (2d) 722.

The Circuit Court of Appeals of the Seventh Circuit had before it the question as to whether or not an employee could carry on the business of a wholesale liquor dealer as construed by Section 1397 (a) (1), Title 26. The Court in affirming the conviction and holding that an employee could be so convicted, said:

> "Obviously a servant will aid and abet another in the carrying on of such business and become a principal if, with knowledge of the business, its purpose and its effect, he consciously contributes his efforts to its conduct and promotion, however slight his contribution may be. Thus the court could not have followed the law and given the charge requested."

Wainer v. U. S., 82 Fed. (2d) 305.

The decision of the Circuit Court of Appeals was affirmed by the Supreme Court.

Wainer v. U. S., 299 U. S. 92.

We respectfully submit that the contention of the appellant Dehne is without merit.

V.

EVIDENCE OF SALE BY EMPLOYEES OTHER THAN DEHNE COMPETENT.

At the trial, witness Johnson testified to his entry of the store and purchasing alcohol from Dehne. He testified that he went into the store on the 9th of March, 1939 (R. 63) at 7:25 in the evening (R. 64) and found the clerk Varco there. He was then asked what he said to the clerk and the objection was made by the appellants to any evidence concerning any other person than Mr. Dehne, who was the person indicted in the complaint. The indictment reads to the appellants throughout, which would mean Edgar Dehne and the United Cigar Whelan Stores Corporation. The objection was overruled by the Court and exception taken (R. 65). This is the reason for specification of error No. III.

There seems to be no argument in support of Assignment of error No. 111 and no authorities are cited holding the Court erred in the admission of the testimony and no reason is given in support of the assignment.

The corporate appellant was named as a defendant on all counts. The witness was testifying as to the occurrences in the corporate appellant's place of business on the 9th of March, 1939, within the time specified in the indictment and as to occurrences had between himself and an admitted employee of the corporate appellant conduct-

ing the business. As it is conceded that the business was actively carried on by the corporate appellant through its clerks and employees, we know of no reason why such testimony would not be competent and within the issues. There is no contention made that the corporate appellant is not liable for the acts of all of its employees.

If it is attempted to be asserted that the evidence was not competent as to Dehne, but was competent as to the corporate appellant, then Dehne is not in a position to urge the matter here under the objection made. The objection was a joint objection made on behalf of both of the appellants, and not being good as to the corporate appellant, it, of necessity, must have been overruled by the trial court. Had it been contended before the trial court that the testimony was not competent as to Dehne, he should have objected to it on that ground and had the Court admonish the jury that it was not to be considered as against him. This was not done. Not having done so, there is no foundation now in the record for him to assert that the trial court was in error.

Objections must be specific,

Duncan v. U. S., 68 Fed. (2d) 136 (9 C. C. A.)

VI.

CONVICTION OF DEHNE ON ALL COUNTS INVOLVING SALES WAS PROPER.

Under its assignment of error VI, it is urged that under no circumstances could Dehne have been convicted on any sales count except for the sales personally made by him.

As heretofore pointed out the alleged error is not available to Dehne here. The assignment of error is based

upon the joint motion of both appellants, asking a direction of a verdict of not guilty. There was no separate motion made by Dehne and neither was there any motion made by Dehne as against each count separately, or asking the court to direct a verdict of not guilty as to the counts in which he did not personally make the sale. The motion being joint the Court properly overruled the motion as made, for irrespective of any liability of Dehne for the acts of the other clerks, it is not questioned that the corporate appellant was liable for them and the motion was not good as to it.

On the record the trial court would have been in error had it directed a verdict in favor of Dehne on the counts in which he did not personally sell the alcohol. The record discloses, from the testimony of Dehne and the other clerks, that Dehne was and had been the manager of the store for twelve years (R. 143); that he ordered the alcohol (R. 157); that on his own initiative he eventually ceased the sale of it (R. 150); that the clerks worked under him (R. 166); and that after receiving the warnings from the officers of the Alcohol Tax Unit, he conferred with the clerks with reference to their future conduct in the sale of the alcohol (R. 150, 167 and 183).

Under this evidence there can be no question but what Dehne was in control of the store, in control of the action of the clerks and with the authority to direct and actually directed their action with reference to the sale of this alcohol in the store and in carrying on the business, and there was ample evidence before the jury for them to determine whether or not the clerks did carry on the business and sell the alcohol as directed by Dehne.

There was no contention made at the trial by Dehne

that in selling the alcohol as they did, the clerks violated any instructions or directions given by him.

Under these circumstances the appellant Dehne is a principal as defined by Section 550 of Title 18.

However, it is urged that there was no evidence to show that Dehne was present in the store at the time of the sales by the other clerks. That has nothing to do with Dehne's liability. His presence was not required as a prerequisite to his being a principal.

In

Borgia v. U. S., 78 Fed. (2d) 550,

this Court said:

> "It is not necessary that an aider or abetter be present at the actual commission of the offense, or know the details thereof."

We respectfully submit there is no merit in the appellants' assignments of error III and VI.

VII.

NO EVIDENCE WAS INTRODUCED THAT A CRIMINAL OFFENSE WAS COMMITTED BY THE APPELLANTS OTHER THAN THOSE SET OUT IN THE INDICTMENT.

By assignment of error IV the appellants urge that the Court committed error by permitting testimony indicating inferentially that the appellants were guilty of violations other than those set out in the indictment.

The indictment charged in count one that the appellants carried on the business of retail liquor dealer, without paying the tax, between the 9th of March, 1939, and the 15th of April, 1939. When the police officer Beadle was on the witness stand, after testifying that he had

been stationed in front of the place of business of the corporate appellant for sometime, he was asked whether he had made any observations, or what he had seen with reference to the United Cigar Store and the sale, if any, of rubbing alcohol. The objection was made that the evidence did not relate to any of the purchases alleged in the indictment, but merely to general purchases. The objection was overruled and he answered that he had noticed dehorns and rubbing alcohol drunkards going into the store and coming out with bottles of rubbing alcohol, sometimes in packages and sometimes unwrapped. The question called for his observations as to the business, its course and conduct carried on, between the first of January and the period between the first of January, 1939 and the Ninth of March, 1933 was without the indictment or too remote.

The question did not seek to elicit and did not elicit any information with reference to any other or different offense. It sought information with reference to the carrying on of the business that the appellants were charged with having carried on. It is competent to prove sale of liquor in proving the charge of carrying on the business of a retail liquor dealer.

Hunter v. U. S., 264 Fed. 831.

It is impossible to carry on the business of a retail liquor dealer without selling liquor. One of the things that the sales prove is the fact that the one charged possessed liquor to sell. However, the offense charged is the carrying on of the business and the proof of other sales is competent to establish the charge.

Ledbetter v. U. S., 170 U. S. 606.

In

Campanelli v. U. S., 13 Fed. (2d) 750,

decided by this Court, defendants were indicted for a conspiracy to violate the National Prohibition Act, the dates alleged in the indictment being between February 1, 1924, and October 8, 1924. This Court held that there was no error in permitting evidence of settlement of accounts between the two defendants for liquor transported in the year 1923.

A like holding was made by this Court in

Rubio v. U. S., 22 Fed. (2d) 766.

The rule laid down in Cyc. is that the state may prove sales to other persons, or sales on other dates than those charged, not only about the time named in the indictment, but for a considerable period of time before, where there is evidence showing a continuity of the business.

16 C. J., Section 1175, Page 606.

Where the charge in the indictment is that one is carrying on a business in the selling of a certain article, it is certainly competent evidence to go to the jury to show that the place of business was frequented by those who used and desired the article sold and who were seen to leave the premises in possession of the article sold. The weight of such evidence, of course, is for the jury, but that does not effect its competency.

Not only was the evidence competent to prove the charge of carrying on the business, but it was equally competent to prove the charge of selling to Johnson under circumstances from which the seller could reasonably deduce that the alcohol was to be used for beverage purposes. Certainly, if the appellants were selling denatured alcohol indiscriminately to any purchaser for beverage

purposes, that would be one of the circumstances within their knowledge and likewise a circumstance to be taken into consideration by the jury, along with all of the other facts and circumstances to determine just what the circumstances were under which the sales of denatured alcohol were made to Johnson, and what the appellants should have deduced from those circumstances.

Again, if it be said that the objection was well taken at the time it was made and the evidence should have been excluded at that time, nevertheless the evidence is now properly in the record.

It appeared from the evidence on behalf of the appellants, introduced not only in their case in chief, but introduced by them on cross examination in the government's case in chief, and by the offer of the statement of Dehne and the other clerks in evidence, that the appellants had, prior to the First of January, 1939, carried on the business of retail liquor dealer. Under the facts of the case there can be no dispute as to that and it is not seriously contended otherwise by appellants in their brief. The defense of the appellants was not that they had not been engaged in the business of a retail liquor dealer in selling denatured alcohol, but that after the first of January, when they received their last warning from the officers, they ceased the business. Thus the appellants had been carrying on a continuing business and it was competent for the government to show that they still continued that same business in spite of their contention that they ceased it, and for that purpose and show a continuing business the evidence became and was competent in the case.

There was no effort to prove by the government other

offenses committed by the appellants. The government did prove in the case the continuous carrying on of the business, that the appellants were charged with carrying on, over a part of the time.

CONCLUSION.

In conclusion we respectfully submit that appellants were fairly tried upon the charges contained in the indictment that ample competent evidence was introduced to establish the truth of the charge and to support the verdict of the jury as to their guilt; that the appellants were accorded every right afforded to them under the law; that no error was committed that in any respect affected their substantial right, and that the verdict of the jury and the judgment of the Court is amply sustained by the evidence and should be affirmed.

Respectfully submitted,

JOHN B. TANSIL
United States Attorney for the District of Montana, Billings, Montana.

R. LEWIS BROWN
Assistant United States Attorney for the District of Montana, Butte, Montana.

No. 9397

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED CIGAR-WHELAN STORES CORPORATION (a corporation), and EDGAR DEHNE,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF FOR APPELLANTS.

JESSE H. STEINHART,
JOHN J. GOLDBERG,
111 Sutter Street, San Francisco, California,
Attorneys for Appellants.

CORETTE & CORETTE,
ROBERT D. CORETTE,
WILLIAM A. DAVENPORT,
Hennessy Building, Butte, Montana,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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REPLY BRIEF FOR APPELLANTS.

MOST OF THE EVIDENCE REFERRED TO IN APPELLEE'S "STATEMENT OF THE CASE" AND IN OTHER PORTIONS OF ITS BRIEF IS NOT WITHIN THE ISSUES OF THE CASE AND IS THEREFORE IRRELEVANT.

The rules of this court provide that no statement of the case is required in appellee's brief unless that presented by appellant is controverted (Rules of the United States Circuit Court of Appeals for the Ninth Circuit, Rule 20, Paragraph 3). Though it does not appear even by intimation that the statement of appellants is controverted in any particular whatsoever, appellee commences its brief with a so-called "Statement of the Case", the greater part of which consists of a statement of matters not within the issues of the case and therefore not to be considered on this appeal.

The major part of the statement consists of alleged occurrences prior to the period in question, namely, March 9 to April 15, 1939. Appellee seeks to justify the inclusion of these statements and to show their materiality on the ground that the government was justified in showing a continued course of business, and that any evidence showing this, even though it concerned acts prior to the earliest date set forth in Count 1 of the indictment, namely, March 9, 1939, was relevant. However, appellee apparently overlooks the fact that while Count 1 of the indictment states that appellants carried on the business of a retail liquor dealer without payment of the tax, it limits this charge to the specific sales made to Julius N. Johnson, the government agent, and states that these specific sales constituted the carrying on of the business of a retail liquor dealer. This being the case, appellee should unquestionably have been limited in its proof to evidence concerning the making of the particular sales charged, and any other alleged conduct of appellants, either during the period in question or prior thereto, is wholly immaterial. Obviously, the alleged conversations between appellant Dehne, the other clerks, and the government agents, occurring prior to the date in question and not connected with the particular sales charged, the testimony of the government agent that on January 12 he had talked to a man who had been arrested as a drunk and who said he had purchased a bottle of alcohol from the store of the appellant United Cigar-Whelan Stores Corporation, and the testimony of the police officer that prior to and during the period in question he had observed so-called "de-horns" going

into and coming out of the store (R. pp. 111, 112) (not "frequenting" the store, as stated by appellee), and that he had seen some of the de-horns drunk (R. p. 113) (not drinking alcohol sold by appellant, as stated in the brief of appellee), are this type of testimony and are wholly immaterial to the issues in this case.

The limitation of the charge in Count 1 to specific sales made to Johnson, the government agent, was proper and was required under the law applicable to this case. However, appellee has not so limited the argument in its brief. It states therein that appellants were charged with carrying on the business of a retail liquor dealer without the purchase of the required stamp—without stating the further fact that under the indictment and the applicable statutes, the stamp was only required if it appeared that the regulation of the Commissioner of Internal Revenue (Art. 146-A, Regulations No. 3, as amended) was violated, that is, if it appeared that appellants made sales under circumstances from which they might reasonably have deduced that it was the intention of the purchaser to procure the articles for use for beverage purposes. From its false premise, appellee arrives at the conclusion that even though the evidence shows that the government agent did not procure for beverage purposes the only denatured alcohol which it was charged or proved that the appellants sold—that is, even though the evidence shows that the regulation in question was not violated—a general course of business of the sale of denatured alcohol was proved and this was sufficient to convict the appellants.

In order to prevent any misunderstanding, it should be made clear that the foregoing argument of appellee is manifestly erroneous. As we stated in our opening brief, there was not, and there could not be, a violation of the statutes requiring strip stamps and a retail liquor dealer's stamp unless it was proved that the appellants sold denatured alcohol *under circumstances from which they might reasonably have deduced that it was the intention of the purchaser to procure the articles for use for beverage purposes,* in violation of the regulation. Ordinarily, denatured alcohol and the sale thereof are not subject to the statutes applicable to alcohol that is not denatured—that is, the statutes levying a tax (evidenced by strip stamps) and requiring vendors to obtain a special stamp. (I.R.C., Section 3070, 26 U.S.C.A. 3070). It is only by virtue of 27 U.S.C.A. 153 that denatured alcohol becomes subject to these statutes. The pertinent provisions of 27 U.S.C.A. 153 read as follows:

> "Any person who shall * * * sell * * * denatured alcohol * * * in violation of laws or regulations, now or hereafter in force, pertaining thereto, and all such denatured alcohol * * * shall be subject to all provisions of law pertaining to alcohol that is not denatured, including those requiring the payment of tax thereon; and the person so * * * selling * * * the denatured alcohol * * * shall be required to pay such tax."

Therefore, only when denatured alcohol is sold in violation of laws or regulations does it become subject to the statutes levying a tax on alcohol and requiring

vendors to obtain a special stamp. There is no such "law"—using the word in the sense of an enactment of Congress—which is applicable in this case. The only possible basis for this proceeding is the claim that the sales of the articles containing denatured alcohol were in violation of the regulation in question.

Therefore, appellee's claim that it was charged and proved that appellants carried on the business of a retail liquor dealer without purchasing the stamp required begs the question, because it was essential that it be proved that a stamp was required, namely, that the regulation was violated in that sales were made under circumstances from which appellants might reasonably have deduced that it was the intention of the purchaser to procure the articles for use for beverage purposes. The necessity of proof as to specific sales was recognized by the trial judge when he instructed the jury as follows (R. p. 213):

> "Reverting to the first count, the burden is upon the government to show that on or about March 9, 1939, or the early part of this year, at 34 North Main Street, Butte, Montana, the defendants did sell one or more of these exhibits" (the exhibits being the specific bottles sold to Johnson, the government agent) "under circumstances which would cause one reasonably to deduce that the article was sold or was bought for the purpose of being drank or drunk. * * *"

We desire at this point to correct some of the other statements made bv the appellee in its argument. It is stated on page 6 that from the written statements

of the appellant Dehne and the clerks (R. pp. 96-99), it is apparent that in selling the alcohol, they made no inquiries of the individuals they sold to, used no care in its sale, and sold it indiscriminately to any person who came in and desired it for any purpose. This definitely does not appear any place in the record. The record shows that even before the period commencing March 9, 1939, the appellant Dehne and the other clerks did not sell the denatured alcohol indiscriminately, and it conclusively shows that during the period in question they did not sell the denatured alcohol to anyone who they thought intended to drink it and that prior to that period they decided to and thereafter did use care in the sale of the articles (R. pp. 149, 150, 167, 183, 184, 187).

A fair reading of the record establishes that Dehne and the other clerks did in good faith attempt to observe the regulation in question. Naturally, since such observance called for the exercise of judgment, there may have been errors of judgment, and sales may have been made which other clerks would not have made. This is not shown, however, by the sales to Johnson.

Appellee further states that Johnson's testimony shows that he made numerous and frequent purchases from Dehne and the other clerks without any inquiries being made of him as to why he needed the alcohol or what his intended use of it was. The testimony of Johnson only showed that on March 9, 1939, he made two purchases an hour apart from Dehne, on March 10 he made two purchases from Dehne approximately

nine hours apart, and on April 15 he made two purchases from clerk Walter Maenpa approximately one and one-half hours apart. On March 9 he also made two purchases from another clerk named Varco approximately an hour apart, and on March 10 he made two more purchases from Varco approximately four hours apart. It did not appear that the clerks recognized him when he returned to the store, or that there was any reason that they should have deduced that he intended to drink the denatured alcohol. He was not a drunkard, nor did he give evidence of having been drinking. His clothes were usual among the customers of the store in question. While he made ten purchases on three different days between March 9 and April 15, 1939, these were made from three different clerks, no one of whom was on duty when any other of the clerks was present. Accordingly, no one of them knew of the sales which the others made to Johnson. Although each clerk made two sales to Johnson on a single day, there were between 600 and 700 persons in the store each day, and naturally a person not a regular customer would not necessarily be remembered as having been in the store previously on the same day.

The statement of appellee that the quantity of denatured alcohol sold as compared with that sold by drug stores in Butte shows that it was sold for purposes other than legitimate use, needs no answer other than to point out that the denatured alcohol was sold for a lower price in the store of United Cigar-Whelan Stores Corporation than in any of the other drug stores concerning which there was testimony (R. pp. 103, 105, 117, 120-124, 145).

EVEN THOUGH THERE MAY HAVE BEEN SOME SLIGHT TECHNICAL DEFECT IN THE MANNER IN WHICH SOME OF THE QUESTIONS OF ERROR WERE RAISED, THE COURT CAN, AND WE BELIEVE SHOULD, NOTICE AND CORRECT THESE ERRORS.

Appellee prefaces almost every one of its arguments with the technical objection that the particular point in question raised by appellants is not properly before the court because of some claimed technical defect in the motions or objections made by appellants, and therefore "cannot" be considered by this court. In making these statements, appellee has evidently overlooked the rule enunciated by the Supreme Court in the case of *Wiborg v. United States,* 163 U.S. 632, 16 S. Ct. 1127, 41 L. Ed. 289 at 298:

> "No motion or request was made that the jury be instructed to find for defendants or either of them. Where an exception to a denial of such a motion or request is duly saved, it is open to the court to consider whether there is any evidence to sustain the verdict though not to pass upon its weight or sufficiency. And although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it."

This rule is likewise recognized in the rules of this court (Rules of the United States Circuit Court of Appeals for the Ninth Circuit, p. 23; Criminal Appeals, Rule (2d)). Certainly under these rules the court "can" consider these errors, and we believe that the errors complained of are so plain and concern matters so vital to appellants that the court will notice

them even if there may have been some slight defect in the manner in which they were first called to the attention of the trial court.

APPELLEE HAS IN EFFECT FAILED TO ANSWER APPELLANTS' CONTENTION THAT THE GOVERNMENT FAILED TO PROVE A VIOLATION OF THE REGULATION OF THE COMMISSIONER OF INTERNAL REVENUE IN QUESTION.

It was undoubtedly apparent to appellee that the point on which appellants mainly relied was that there was no proof of any violation whatsoever, the only testimony as to the sales charged being that of the government agent, and as he did not intend to and did not, nor did anyone else, drink the denatured alcohol sold, the regulation in question was not violated. However, appellee's only answer to this contention is the citation of two cases which are not even remotely in point, as we shall hereafter show, and a reference to testimony concerning alleged acts which were certainly not within the issues of this case.

APPELLEE HAS NOT DISTINGUISHED THE CASE MAINLY RELIED UPON BY APPELLANTS.

Appellee attempts to distinguish the case of *Sherman v. United States,* 10 Fed. (2d) 17, one of the cases cited by appellants, on the grounds, first, that in that case the defendants were prosecuted for an alleged violation of the National Prohibition Act, while in the instant case the prosecution is for an alleged violation of a revenue statute, and secondly, that in the *Sherman*

case the court was construing a statute while in the instant case it is construing a regulation. Appellee does not suggest any reason why a revenue statute should be construed any differently than a prohibition statute, or why a regulation should be construed more liberally in favor of the government than a statute, and we confess that we are at a loss to determine the reason for any different rule of construction, with the possible exception that a regulation should be more limited and strictly construed against the government than a statute adopted by Congress.

Appellee states that the purpose of the National Prohibition Act was to prevent intoxication and therefore, unless a sale resulted in intoxication because the purchaser drank the intoxicant sold to him, the result which the National Prohibition Act sought to prevent did not occur and the Act was not violated.

In discussing the regulation in question, appellee states that its purpose was to prevent a fraud on the revenue of the United States, which was a different purpose from that for which the National Prohibition Act was adopted. However, it appears that the real purpose of the regulation in question was to prevent the diversion of non-tax-paid alcohol to beverage purposes and therefore, unless the articles sold were used for beverage purposes, the result which the regulation sought to prevent did not occur. That this was the purpose of the regulation (and that it could have no other purpose) becomes apparent from a reading of 27 U.S.C.A. 83, the statute under authority of which the regulation was issued, the pertinent provisions of which read as follows:

> "The Commissioner shall * * * issue regulations respecting * * * the sale * * * and use of alcohol which may be necessary, advisable or proper to secure the revenue, to prevent diversion of the alcohol to illegal uses * * *"

No tax is due upon denatured alcohol, nor is it diverted to illegal uses unless it is used as a beverage. Therefore, unless it is proved that denatured alcohol is used as a beverage, the result which the regulation seeks to prevent, namely, the use of non-tax-paid alcohol as a beverage, does not occur, and there is no violation of the regulation.

THE CASES CITED BY APPELLEE ARE NOT IN POINT.

We will not repeat the argument we made in our opening brief as to the reasons that the cases we cited on this point are applicable and controlling in this case, because we believe that we have conclusively shown that that is the fact. However, as appellee has not seen fit to set forth all of the facts or the pertinent portions of the decisions in the two cases which it states announce a different rule from the cases we cited, we desire to call the court's attention to these cases.

In the case of *Burnstein v. United States,* 55 Fed. (2d) 599, it appeared that two government agents and the wife of one of them went to the restaurant operated by the defendant and ordered three "shots" of bitters. After these had been consumed by these three persons, they ordered and consumed three more

drinks of bitters. They then had sandwiches and ordered another round of bitters. While the agents were in the premises, they observed other people standing at the bar drinking red liquid out of the same kind of glasses as furnished to the agents. As far as appears from the opinion in that case, the defendant did not make the same contention we are making but, even if he had done so, it would obviously have been unavailing for the reason that the bitters in question were actually used for beverage purposes, and the defendant knew that this was the fact. The difference between the facts and the issue before the court in the *Burnstein* case and the instant case becomes apparent in the following portions of the opinion of the court (p. 603):

> "It is clear from the testimony, including that of the appellants themselves, that the bitters were sold to be drunk on the premises, that is, for beverage purposes, for a thing sold to be drunk is necessarily sold as a beverage. A beverage means something to be drunk. If the preparation sold, however, is intended by both the seller and the buyer to be used as a medicine, the sale would not be a violation of the National Prohibition Law. * * *"

(p. 604):

> "It seemed clear that when neither the seller nor the purchaser pretends to know what the medicine is good for or what the purchaser's physical condition is, and both know that the preparation contains 47% alcohol, it is impossible to avoid the conclusion that *the purchaser intends to use the bitters as a beverage* and not as a

> medicine, and that *the seller knows that such is his purpose.* The time, place and circumstances of the sale make it plain that the bitters were not intended as a medicine." (Italics ours.)

In sustaining an objection to a question as to whether bitters could be used for beverage purposes, the trial court stated (p. 605):

> "The question before the jury is whether it *was used for beverage purposes.*" (Italics ours.)

The Court of Appeals held that this ruling was correct.

In answering another point raised by appellants, the court said (p. 606):

> "There is no serious dispute in the case as to the fact that the bitters in question were sold upon appellant's premises by his agent for the purpose and with the intent that the bitters should be drunk upon the premises."

And,

> "The fact is that there is no evidence whatever which would justify the conclusion that the bitters were sold for any purpose other than as a beverage."

Thus, in the *Burnstein* case the defendant did not and could not deny that he sold the bitters in glasses to be drunk on the premises and that the bitters were in fact so consumed, his sole contention being that he sold the bitters for consumption as medicine and not as a beverage. Since the government agents bought and drank three "rounds" of the bitters at one time,

it can hardly be contended that the jury in that case was not justified in finding that the bitters were sold and consumed as a beverage and not as a medicine.

In the instant case, however, the government agent who bought the rubbing alcohol not only did not drink any of it, but he never intended to drink any of it. The agent himself so testified (R. p. 81) and there is no evidence to the contrary. Accordingly, there was no basis for any finding of the jury that the agent did intend to drink the rubbing alcohol, and without such intent of the purchaser the regulation cannot be violated.

Appellee attempts to show that the *Burnstein* case is in point by the statement that if Johnson had taken a drink, appellants would have contended that the taking of the drink was simply a subterfuge for the purpose of obtaining evidence and not for the real purpose of consuming the alcohol as a beverage. We have never contended and do not now contend that if Johnson had actually used the denatured alcohol as a beverage, the regulation would not have been violated, assuming, of course, that sales to him were made under circumstances from which appellants might reasonably have deduced that it was Johnson's intention to procure the denatured alcohol for use for beverage purposes. As we have stated repeatedly, our sole contention as respects this issue is that he did not intend to and did not, in fact, use it as a beverage.

The statement that the Circuit Court of Appeals for the Fourth Circuit in the case of *Massei v. United States,* 295 Fed. 683, came to an opposite conclusion

to that urged in the *Sherman* case in construing the identical statute is not correct. This appears conclusively from the following quotation from the opinion (p. 684):

> "The conclusive answer to the defendant's present claim that it was not proved that the extracts were fit for beverage purposes is supplied by the testimony of one of the purchasers who swore that he paid 50¢ for the extract because that would give him a good drunk, while it would cost $1.50 to get enough corn liquor to bring about that same longed-for result."

In no place in that case did it appear that the extract in question was purchased by a government agent or for evidentiary purposes, or that the purchaser did not intend to and did not, in fact, drink the extract. There is thus no similarity between the facts and the issue in that case and the instant case.

Appellee also states that the regulation in question does not say anything about the intent of the purchaser. A reading of the regulation will show that this statement is not correct, and that the contrary is the fact, since the only intention referred to is "the intention of the purchaser".

Appellee's last contention on this point is that if the testimony of government agents, like that of witness Johnson, is held not competent, it would be impossible to convict persons violating this regulation. It seems odd that in the instant case, though the government claims that the store in question was "frequented" by rubbing alcohol drunkards, and the gov-

ernment agent and policeman who testified claimed that they talked to some of these men and they knew their names, not one of them was produced as a witness by the government. In all of the other cases which we have been able to find which deal with statutes similar to the regulation in question (excepting the case of *Burnstein v. United States,* supra, where the government agents themselves actually drank the substance), the government has been able to produce witnesses who purchased and used the substances for beverage purposes. We do not believe, nor does the record herein indicate, that the necessity of producing such witnesses presents an insurmountable obstacle to the enforcement of the regulation.

APPELLANTS DID NOT AND DO NOT CONCEDE THAT THE EVIDENCE WAS SUFFICIENT TO CONVICT APPELLANTS UNDER ANY OF THE COUNTS OF THE INDICTMENT.

In discussing appellants' Assignments of Errors 2 and 6 (pp. 16 and 17 of appellee's brief), appellee states that appellants conceded there was sufficient evidence to go to the jury as to the last two sales made on April 15, 1939. Any concession that might have appeared in appellants' argument was, of course, limited solely to the matter then being discussed; that is, it was our contention that even if Johnson had actually used the denatured alcohol which he purchased as a beverage, there was no evidence of circumstances from which the appellants might have reasonably deduced that it was his intention to do so, and, therefore, that even

though Johnson had drunk the denatured alcohol, there could in no event have been a conviction except possibly for the last two sales. Of course we believe it must be apparent that we did not and do not concede that any of the sales made to Johnson, regardless of the circumstances under which they were made, constituted a violation of the regulation.

APPELLEE'S FAILURE TO ANSWER APPELLANTS' CONTENTION THAT THERE WAS DOUBLE PUNISHMENT MAKES IT APPARENT THAT THIS OCCURRED. THE CASES CITED BY APPELLEE DO NOT ANNOUNCE ANY DIFFERENT RULE THAN IS STATED IN THOSE CITED BY APPELLANTS.

We do not disagree with any of the cases cited by appellee in discussing the question of double punishment, but we do disagree with appellee's statements of the facts existing in these cases, and with its statements as to the rules announced in these cases. Appellee states that the charge in Counts 2 to 11 inclusive was the sale of alcohol for beverage purposes and that it was not an element of this offense that the containers did not have affixed thereto the required strip stamp. It further states that the charge in Counts 12 to 21 inclusive was the sale of alcohol in containers on which no stamp was affixed. It is only necessary to glance at the counts to see that this statement of appellee does not set forth the whole of the charge. The charge in Counts 12 to 21 inclusive was the sale of denatured alcohol under circumstances from which the appellants might have deduced the intention of the purchaser to procure the same for

use for beverage purposes, and that the sale was made in unstamped containers. Therefore, to convict under Counts 12 to 21 inclusive, it was necessary for appellee to prove the sale of denatured alcohol under circumstances from which the appellants might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, *and* that the sale was made in unstamped containers, and to convict under Counts 2 to 11 inclusive it was necessary to prove only one of these elements, namely, the sale of denatured alcohol under circumstances from which the appellants might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes. If appellee had reversed the order in which it discussed the two groups of indictments, that is, discussed Counts 12 to 21 inclusive first, and then Counts 2 to 11 inclusive, it would have definitely appeared that there was double punishment. It has been settled without question that where a defendant is being or has been tried for an offense containing several elements, he cannot at the same time or subsequently be tried for an offense which includes some of these elements, unless the latter offense also includes elements not appearing in the first offense charged.

Krench v. United States, 42 Fed. (2d) 354;
Rouda v. United States, 10 Fed. (2d) 916;
Tritico v. United States, 4 Fed. (2d) 664.

As is stated in the case of *Morey v. Commonwealth,* 108 Mass. 433 (cited with approval in *King v. United States,* 31 Fed. (2d) 17), it is only where each statute requires proof of an additional fact which the other

does not that an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other. Certainly, Counts 2 to 11 inclusive did not require the proof of any facts in addition to those which were required under Counts 12 to 21 inclusive, nor does appellee contend otherwise. The true rule is stated in the case of *Blockberger v. United States,* 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (p. 309):

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."

or, as it is stated in another way, in the case of *Bertsch v. Snook,* 36 Fed. (2d) 155 (p. 156):

> "The same offense is charged by two separate counts of an indictment where the evidence required to support a conviction upon one count would have been sufficient to warrant a conviction upon the other."

Counts 2 to 11 inclusive did not require proof of any fact in addition to those required by Counts 12 to 21 inclusive, and the evidence sufficient to support a conviction under the latter counts would be sufficient to support a conviction under the earlier counts.

In the case of *King v. United States,* 31 Fed. (2d) 17, one of the cases cited by appellee, the defendant was convicted of selling morphine not from the orig-

inal stamped package, and of sending the same morphine in interstate commerce without having paid the special tax. The court held (p. 18):

> "It will be observed at a glance that the offenses charged in the two indictments are not the same in law, and that the evidence required to support the first indictment would not support the second inasmuch as there may be a sale of narcotics without a shipment in interstate commerce and there may be a shipment in interstate commerce without a sale."

The court then quoted with approval from *Morey v. Commonwealth,* 108 Mass. 433, and finally said (p. 19):

> "And in the Morgan case, in order, apparently, to end further controversy, the court said: '* * * this court has settled that the test of identity of offenses is whether the same evidence is required to sustain them;' "

and that there is no double jeopardy

> "unless the first crime was included within the second as a matter of law".

There is no question but that the alleged crimes charged in Counts 2 to 11 inclusive were, as a matter of law, included in the crimes charged in Counts 12 to 21 inclusive. Appellee cites the case of *Macklin v. United States,* 79 Fed. (2d) 756, as authority for its statement that the test of identity is whether the same evidence is required to sustain both. In that case the court held that there was no double jeopardy because (p. 758):

> "Each offense requires a different proof * * *."

In the case of *Remaley v. Swope,* 100 Fed. (2d) 31, the court said (p. 33):

> "* * * the rule has been developed that where two offenses are charged, having relation to the same matter or transaction, there is no double jeopardy * * * *if each offense requires proof of a fact which the other does not.*" (Italics ours.)

This is certainly not the situation in the instant case.

The case of *United States v. One Oldsmobile Coupe,* 22 Fed. (2d) 441, was a libel proceeding against an automobile because of the transportation therein of certain whiskey. The owner of the car had, prior to the institution of that proceeding, pleaded guilty to *possessing* intoxicating liquor. He was not being prosecuted for the offense of *transporting* intoxicating liquor. The court merely stated that unlawful possession of intoxicating liquor and transportation thereof are two separate offenses under the National Prohibition Act, and that the conviction of one is not a bar to the prosecution of the other. It is apparent that in the libel proceeding there was no real question of double jeopardy because the owner of the car had been prosecuted for but one crime.

The indictment in the case of *Ross v. United States,* 103 Fed. (2d) 600, was for a violation of 18 U.S.C.A. 334, which provided that whoever knowingly deposited obscene matter in the mail for the purpose of circulating or disposing of the same was guilty of a crime. Prior to the commencement of the action, appellant had been acquitted on an indictment based upon 18 U.S.C.A. 339, which provided that whoever used

any fictitious name for the purpose of conducting any unlawful business by means of the postal service was guilty of a crime. It was not necessary to prove under the indictment in the first proceeding that the letter in question was obscene, nor did the indictment so allege, and under the indictment in the second proceeding it was not necessary to prove the use of a fictitious name; in other words, each indictment contained an element which the other did not, and therefore on neither indictment could the defendant have been convicted with only the evidence necessary under the other. All that the court stated was (p. 602):

> "Of course it is not always true * * * that if any one essential element of an offense upon which a defendant is put to trial is also an essential element of another alleged offense that the jeopardy rule applies to prevent a trial upon the latter one."

APPELLEE HAS CITED CASES WHICH HOLD THAT AN EMPLOYEE CAN BE CONVICTED OF A VIOLATION OF 26 U.S.C.A. 1397(a)(1), BUT WE BELIEVE THE BETTER AND MORE LOGICAL RULE IS STATED IN THE CASE OF ANDERSON v. UNITED STATES, 30 FED. (2d) 485, THAT IS, THAT ONLY AN OWNER WHO CONDUCTS THE BUSINESS CAN VIOLATE THIS SECTION.

We admit that the cases cited by appellee in answer to our argument that Dehne should not have been convicted under Count 1, announce a different rule from that announced in the case of *Anderson v. United States,* 30 Fed. (2d) 485. However, this point has not, to our knowledge, been passed upon by the Supreme Court, and in the only case cited by appellee

in which certiorari was granted (*Wainer v. United States,* 299 U.S. 92, 57 S. Ct. 79, 81 L. Ed. 58), it was limited to the question as to whether the statute under consideration was repealed by the National Prohibition Act. We believe that the rule announced in the *Anderson* case should be followed in this proceeding.

APPELLANT DEHNE DID NOT DIRECT THE OTHER EMPLOYEES TO MAKE SALES, AS WAS INTIMATED BY APPELLEE, NOR DID HE PARTICIPATE IN SALES BY OTHER EMPLOYEES, AND THEREFORE, EVEN IF WE ASSUMED THAT THE GOVERNMENT WITNESS TESTIFIED HE DRANK THE DENATURED ALCOHOL, DEHNE SHOULD NOT HAVE BEEN CONVICTED FOR MORE THAN THE FOUR SALES MADE BY HIM.

Appellee's only answer to appellant Dehne's contention that in any event he should not have been convicted for more than four of the sales, is that Dehne was the manager of the store and had authority to direct the action of the clerks with reference to the sale of the alcohol. Appellee further states that the record (R. pp. 150, 167, 183), shows that Dehne conferred with the clerks with reference to their conduct in the sale of alcohol. However, the portions of the record referred to show only that in discussions between Dehne and the clerks, they decided not to sell denatured alcohol to anyone who they thought was going to drink it, and that that question should be decided by the clerk making the sale. Certainly, unless Dehne instructed the clerks to sell the denatured alcohol to anyone who asked for it—and the record does not show that this was the fact—he could

not know the circumstances under which the other clerks made the sales, and even under 18 U.S.C.A. 550 he would not be a principal. We desire to again call the court's attention to the fact that our inferential admission that Dehne could have been convicted for four sales was limited to the point then being discussed, that is, it was our contention that even if Johnson had testified that he drank the denatured alcohol, and the circumstances indicated his intention to do so, appellant Dehne could not have been convicted for more than four of the sales made.

THE THEORY UPON WHICH APPELLEE RELIES IN SUPPORT OF ITS CONTENTION THAT NO EVIDENCE OF CRIMES OTHER THAN THOSE SET OUT IN THE INDICTMENT WAS INTRODUCED, NAMELY, THAT APPELLANTS WERE CHARGED WITH CARRYING ON A CONTINUOUS ILLEGAL BUSINESS, IS NOT TENABLE, AND THEREFORE THE EVIDENCE IN QUESTION WAS IMPROPERLY ADMITTED.

Appellee's only answer to our contention that the trial court committed error in permitting the introduction of testimony concerning other alleged violations is that Count 1 of the indictment alleges generally that the appellants conducted a business as a retail liquor dealer. We again desire to call the court's attention to the fact that Count 1 contains no general allegation that the appellants conducted the business of a retail liquor dealer. On the contrary, the allegation is single and specific that such a business was conducted "in that" the particular sales to Johnson were made on designated dates. For that reason, the cases cited by appellee are not in point

and need not be discussed. We reiterate that any evidence as to alleged acts other than those specifically charged was irrevelant, and its admission seriously prejudiced the appellants and was reversible error.

CONCLUSION.

We do not believe that appellee has answered the points we raised in our opening brief, and we therefore again respectfully submit that the judgment should be reversed.

Dated, San Francisco, California,
April 8, 1940.

JESSE H. STEINHART,
JOHN J. GOLDBERG,
Attorneys for Appellants.

CORETTE & CORETTE,
ROBERT D. CORETTE,
WILLIAM A. DAVENPORT,
Of Counsel.

No. 9400

United States

Circuit Court of Appeals

For the Ninth Circuit.

GARDEN CITY CANNING COMPANY,
Appellant,

vs.

WILLIAM ADDY, J. B. BOWEN, J. T. HEIDOTTING, R. J. SUTTON and JOHN SAUNDERS,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Southern Division of the United States District Court, for the Northern District of California.

No. 27284-L

In the Matter of

GARDEN CITY CANNING COMPANY, a corporation,

Debtor.

GARDEN CITY CANNING COMPANY,

Appellant,

vs.

WILLIAM ADDY, J. B. BOWEN, J. T. HEIDOTTING, R. J. SUTTON and JOHN SAUNDERS,

Appellees.

AGREED STATEMENT OF A CASE FOR USE ON APPEAL.

It Is Hereby Stipulated by and between the appellant and the appellees above named, by and through their respective counsel, that the following statement of the case may be used [1*] on appeal under and pursuant to Rule 76 of the Rules of Civil Procedure for the District Courts of the United States:

That on the 6th day of February, 1936, Garden City Canning Company, a corporation, filed its pe-

*Page numbering appearing at foot of page of original certified Transcript of Record.

tition for a reorganization under Section 77b of the Bankruptcy Act and for certain other relief under said section, which said petition shows that the business of the debtor was the packing and canning of fruits and vegetables and drying fruits, and alleged all of the facts necessary to confer jurisdiction upon the United States District Court for the Northern District of California under said Section 77b of the Bankruptcy Act.

That on the 6th day of February, 1936, Honorable Harold Louderback, as Judge of said United States District Court, made and entered the order of said court approving said petition as properly filed under Section 77b of the Bankruptcy Act, permitting the debtor to remain in temporary possession of its business and affairs and directing the debtor to give notice to its creditors and stockholders of a hearing to be had before said District Court on the 2nd day of March, 1936, at which hearing the court might make permanent said order, appoint a permanent trustee or trustees, or make such further order as might be necessary or proper and which said order further provided for the giving of notice to said creditors.

That thereafter on March 3, 1936, the debtor, under and pursuant to said order, filed a verified schedule of its creditors and stockholders, and included amongst said schedule of its creditors the names and addresses of the appellees herein. A

copy of said schedule is attached hereto as Exhibit "A".

That notice of said hearing so set for the 2nd day of March, 1936, was mailed to all of the creditors and stockholders of said debtor, including the appellees herein, and was published [2] as required by said order of February 6, 1936.

That thereafter and on, to-wit, the 12th day of March, 1936, the said District Court, after due continuance of the hearing set for March 2, 1936, made and entered its order, a copy of which said order is attached hereto and marked Exhibit "B".

That thereafter on April 10, 1936, said debtor filed its verified schedules of assets and liabilities; a copy of Schedule A-3 thereto is attached hereto marked Exhibit "C".

That thereafter the debtor filed its "Petition for Order Approving Summary of Order of March 12, 1936", Exhibit "B" hereto, a copy of which petition is attached hereto and marked Exhibit "D", and the summary therein referred to is set out in Exhibit "Q".

That thereafter Honorable Burton J. Wyman, as Special Master, made his order approving a purported summary, a copy of which order is attached hereto and marked Exhibit "E".

A copy of said purported summary was mailed to all of the creditors of said bankrupt, including the appellees herein, on April 30, 1936, and was published as required by the order of March 12, 1936.

That on April 30, 1936, the attorneys for said debtor mailed to all of the creditors of said debtor, including the appellees, a mimeographed copy of a plan of reorganization in the form of Exhibit "F" attached hereto, together with a form of proof of debt.

That thereafter and on May 1, 1936, said debtor filed its plan of reorganization in the form of Exhibit "F" attached hereto.

That thereafter and on the 4th day of June, 1936, appellees filed their verified proofs of claim with the Clerk of said court in the United States Post Office & Courthouse Building, San Francisco, California.

A true copy of the proof of claim filed by R. J. Sutton [3] is attached hereto as Exhibit "G". A true copy of the proof of claim filed by J. J. Heidotting is attached hereto as Exhibit "H". A true copy of the proof of claim filed by John Saunders is attached hereto as Exhibit "I". A true copy of the proof of claim filed by J. B. Bowen is attached hereto as Exhibit "J". A true copy of the proof of claim filed by W. M. Addy is attached hereto as Exhibit "K".

Thereafter and on November 4, 1936, the debtor filed with the Special Master its petition for confirmation of the reorganization plan, copy of which is attached hereto, marked Exhibit "L". Attached to said petition as filed was a copy of the plan of reorganization. (Exhibit "F" hereto.)

That thereafter on November 4, 1936, the Special Master hereinabove referred to made and entered an order calling a meeting of the creditors of said debtor to be held on November 16, 1936, at the hour of 2:00 o'clock P. M. of said day, and approved the form of notice to be sent to said creditors, a true copy of which order is attached hereto as Exhibit "M"; that thereafter a copy of said notice as so approved, a copy of which notice is set out in Exhibit "Q", was mailed to all of the stockholders and creditors of said debtor appearing in the schedules of the debtor on file, including the appellees herein; that thereafter and on December 2, 1936, the Special Master filed his report, a copy of which is attached hereto and marked Exhibit "N"; and that thereafter and on the 15th day of December, 1936, the said District Court made its order approving said plan of reorganization, a copy of which is attached hereto and marked Exhibit "O".

That thereafter and on January 12, 1938, the debtor filed its "Report of Debtor of Complete Execution and Accomplishment of Confirmed Plan of Reorganization and Petition for Final Decree", a copy of which is attached hereto as Exhibit "P".

[4]

That thereafter and on January 22, 1938, the appellees herein filed their "Petition of Certain Creditors Objecting to Report and Final Discharge", and the debtor filed its answer to said objections, and the matter of the hearing of said ob-

jections was referred to Burton J. Wyman, as Special Master. Copies of said "Petition of Certain Creditors Objecting to Report and Final Discharge" and of the debtor's answer appear as part of attached Exhibit "Q", and therefore separate copies are not here attached.

That attached hereto and marked Exhibit "Q" is the certificate and report of the Special Master on objections to report and final discharge of debtor, which said report sets forth the objections of said appellees to said petition for final discharge and the answer of the debtor to said objections.

That attached hereto and marked Exhibit "R" is the supplementary certificate and report of said Special Master; that said Special Master's report came on regularly for hearing before the said District Court, and, after being submitted for decision, the court rendered its opinion in writing, a copy of which is attached hereto and marked Exhibit "S", and made and entered its order, copy of which is attached hereto and marked Exhibit "T"; that attached hereto and marked Exhibit "U" is the notice of appeal from said order; that attached hereto and marked Exhibit "V" is the cost bond on appeal; that attached hereto and marked Exhibit "W" is the stipulation for the extension of time to docket said appeal; that attached hereto and marked Exhibit "X" is the stipulation for the further extension of time to docket said appeal, and attached hereto and marked Exhibit "Y" is the

designation of points to be relied upon on appeal.

That there has been omitted from all of the [5] Exhibits hereto all papers and documents referred to herein or therein which are set forth in full in some other exhibit hereto.

Dated: December 19th, 1939.

LOUIS ONEAL
TORREGANO & STARK
By ERNEST J. TORREGANO
Attorneys for Appellant.

LOYD HEWITT
A. M. DREYER
BROBECK, PHLEGER
& HARRISON
MOSES LASKY
Crocker Bldg.
By MOSES LASKY
Attorneys for Appellees.

ORDER APPROVING STATEMENT

Upon the consideration of the foregoing statement prepared under Rule 76 of the Federal Rules of Civil Procedure, from which it appears that said statement conforms to the truth and that same contains all matters necessary to present the questions raised by the appeal,

It is ordered that the said statement be and the same is hereby approved as the record on appeal.

Dated this 20th day of December, 1939.

[Seal] A. F. ST. SURE
United States District Judge. [6]

CERTIFIED COPY

United States of America,
Northern District of California—ss.

I, Walter B. Maling, Clerk of the United States District Court in and for the Northern District of California, do hereby certify that the annexed and foregoing is a true and full copy of the original Agreed Statement of a Case for Use on Appeal, filed December 20, 1939 In the Matter of Garden City Canning Company, a corporation, Debtor, No. 27284-L, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at San Francisco, Calif., this 20th day of December, A. D. 1939.

[Seal] WALTER B. MALING
Clerk.

By E. H. NORMAN
Deputy Clerk.

[Endorsed]: Filed Dec. 20, 1939. [7]

EXHIBIT "A"

[Title of District Court and Cause.]

DEBTOR'S VERIFIED SCHEDULE OF CREDITORS AND STOCKHOLDERS

To the Honorable, the above entitled Court:

Now comes the debtor above named, Garden City Canning Company, a corporation, and files in the

above entitled proceedings a verified schedule of the creditors and stockholders of said debtor, to whom notice of proceedings as required under the provisions of the Bankruptcy Act should be given, and which [8] schedule sets forth the last known address of each of said creditors and stockholders as far as the same is known to the debtor, to-wit:

Name of Creditor	Address
Addy, W. M.	Yuba City, California
Anderson Stamp Co.	82 S. 2nd St., San Jose, Cal.
Albertoli, John	1197 Columbus Ave., San Francisco California
Butcher, Roy M.	1020 Sherwood Ave., San Jose, California
Bay City Tying Wire Service	540 First St., San Francisco, Californ
Botelho, George	798 N. 13th St., San Jose, Cal.
Bowen, J. B.	Yuba City, California
California Container Corp.	Emeryville, California
Canners League of California	215 Market St., San Francisco, California
Chase Lumber Company	San Jose, California
Can Pack Machinery Company	San Jose, California
Everett, P. A.	Yuba City, California
Farnsworth & Callahan	262 W. Santa Clara St., San Jose, California
Federal Pitter Company	Vernalis, California
Fire Protection Engineering Co.	369 Pine St., San Francisco, Cal.
Fuller, W. P. Co.	361 S. 1st. St., San Jose, Calif.
Gloor & Farrand	Yuba City, California
Greco Canning Co., Inc.	San Jose, California
Garratt & Callahan Co.	148 Spear St., San Francisco, Cal.
Gervassio, Rudolph	264 N. 17th St., San Jose, Cal.
Heidotting, J. J.	Yuba City, California
Highway Transport Co.	559 Sixth St., San Francisco, Cal.

Name of Creditor	Address
Hohwiesner, F. & Co.	206 Sansome St., San Francisco, California
Haslett Warehouse Co.	280 Battery St., San Francisco, California
Heitzmann, F. A. & Son	San Jose, California
Hayden, Fred	369 Stockton Avenue, San Jose, California
Karnegas, Wm.	Yuba City, California
Lindsay, Curtis	17 E. Santa Clara St., San Jose, California
Marwedel, C. W. Co.	76 First St., San Francisco, Cal.
Meschendorf & Winship	Yuba City, California
Modesto Transportation Co.	Modesto, California
Marshall Newell Supply Co.	Spear & Mission St. San Francisco, California
Markovitz & Fox	40 N. 4th St. San Jose, Cal.
Mignola, August & Co.	37 S. Market St. San Jose, Cal.
Noonan, L. F. Co.	P. O. Box 1164, Sacramento, Cal.
National Adhesive Corporation	735 Battery St. San Francisco, California
Pacific Can Company	290 Division St. San Francisco, California
Pacific Canners Association	260 California St. San Francisco, California
Pacific Fire Extinguisher Co.	142 Ninth St. San Francisco, Cal.
Pacific Telephone & Telegraph Co.	San Jose, California
Pacific Gas & Electric Co.	San Jose, California
Posendin Motor Works	78 Race St. San Jose, California
Paineri Welding Works	1141 S. 1st St. San Jose, Cal.
San Jose Supply House	520 S. 1st St. San Jose, Cal.
Smith Manufacturing Co.	106 Stockton Ave., San Jose, Cal.
San Jose Foundry	525 San Augustine St. San Jose, California

[9]

Name of Creditor	Address
San Jose Hardware Co.	San Jose, California
San Jose Water Works	San Jose, California
Saunders, John	Yuba City, California
Smith, Press	Yuba City, California
Stuart Oxygen Company	211 Bay St. San Francisco, Cal.
Sutton, R. J.	Yuba City, California
Valley Truck Line	441 N. San Pedro St. San Jose, Cal.
Western Sheet Metal Works	393 W. Santa Clara St. San Jose, California
Western Metal & Expt. Co.	220 Ryland St. San Jose, Cal.
Williams & Russo	773 W. San Carlos St. San Jose, California
Warren & Bailey	198 2nd St. San Francisco, Cal.
Hauck, Marie	Yuba City, California

Name of Stockholder	Address
G. J. Greco	3rd Floor, First National Bank Bldg San Jose, California
Greco Canning Co., a corporation	Howard and Autumn St., San Jose, California
George C. Fortune	% Balfour Guthrie & Co. Ltd., 35 California St., San Francisco, California.

[Seal] GARDEN CITY CANNING COMPANY, a corporation,
By G. J. GRECO
Its President [10]

United States of America,
Northern District of California,
County of Santa Clara—ss.

G. J. Greco, being first duly sworn, on oath deposes and says:

That he is the president of the Garden City Canning Company, a corporation; that he has duly examined the books of said corporation and hereby certifies on oath that the list of creditors and stockholders, together with the addresses of the same, as are set forth in the attached exhibit, are true and correct, as will appear upon the books of said debtor, and that the Post Office address of said creditors, and each of them, as set forth in said list, is the same as appears upon the books of said debtor.

G. J. GRECO

Subscribed and sworn to before me this 14th day of February, 1936.

[Seal] C. E. LUCKHARDT

Notary Public in and for the County of Santa Clara, State of California.

[Endorsed]: Filed Mar. 3, 1936. [11]

EXHIBIT "B"

[Title of District Court and Cause.]

ORDER PERMITTING DEBTOR TO REMAIN IN PERMANENT POSSESSION OF ITS ASSETS UNTIL REJECTION OR CONFIRMATION OF ITS PLAN OF REORGANIZATION OR DISMISSAL OF PROCEEDINGS

The above entitled court having made, entered and filed herein on the 6th day of February, 1936, an order approving the debtor's petition and fixing the 2nd day of March, 1936, at the hour of 10 o'clock A. M. of said day, at the court room of the above entitled court, as the time and place of the hearing of the debtor's application for an order permitting said debtor to [12] permanently remain in possession of his assets until action has been taken by the court and the creditors upon a plan of reorganization or a dismissal of said proceedings; and at which time and place the court further reserves jurisdiction to make such further and other order or orders amplifying, extending, limiting or otherwise modifying its order as to it may seem proper; and the court having further provided in said order that notice to the creditors and stockholders of said hearing shall be given by the debtor by publishing a notice of said hearing in the San Jose Mercury Herald, a newspaper of general circulation in the City of San Jose, County of Santa Clara, State of California, and directing that the said debtor give

further notice by mailing, postage prepaid, a notice to each creditor and stockholder known to said debtor, at his Post Office address; and it now appearing to the court that such publication was made as required by the order of this court, and that an affidavit of said publication has been filed in the above entitled proceedings; and it further appearing to the court that the mailing of the notice to the creditors and stockholders has been done as required by said order, as appears from the affidavit filed in the above entitled proceedings, and the debtor having appeared at said hearing on the 2nd day of March, 1936, by its officers and its attorneys, Messrs. Louis Oneal of San Jose, California, and Ernest J. Torregano and Charles M. Stark of San Francisco, California, and all parties appearing at said hearing desiring to be heard, having been heard by the court, and the debtor's application for an order permitting it to remain in possession of its assets pending reorganization proceedings, having been submitted to the court, and the court now being fully advised in the premises;

It is hereby ordered, adjudged and decreed as follows:

(1) That the said debtor be and he is hereby permitted to remain in possession of its assets until action has been taken [13] by the creditors and the court, upon its reorganization plan, to be submitted to the court and the creditors, or until the dismissal of the above entitled proceeding, or until the fur-

ther order of this court, during the pendency of said proceeding.

(2) That the order of the court dated February 6, 1936, as hereinafter supplemented and modified, be and the same hereby is continued in full force and effect, and that the debtor be and it is hereby authorized to administer its assets and conduct its business in the normal course thereof, and to manage and operate, and to receive and collect the rents, issues and profits from the business and the properties of the debtor's estate, subject to the provisions of and with all the powers and authority granted by said order, except as herein modified.

(3) That the debtor herein shall, prior to the 2nd day of April, 1936, unless prior to said date for good cause shown said time shall be extended by the court, file in the above entitled proceedings its verified schedules setting forth in detail its assets and liabilities, including the names and addresses of its stockholders and creditors, and shall submit such other information from time to time to the Special Master appointed and designated therein, as shall be necessary or required to disclose the conduct of the debtor's affairs, and the fairness of any proposed plan of reorganization.

(4) That except as otherwise specifically provided in Section 77b of the Bankruptcy Act, notice of subsequent proceedings arising in the ordinary course and conduct of the business and the administration of the assets of the debtor's estate herein, and other than proceedings before the Special

Master for the disallowance or liquidation of claims of parties in interest, shall be given to such persons or parties as have been granted, or shall hereafter obtain, leave of the court to intervene in these proceedings. [14]

(5) That the debtor herein shall file in the above entitled proceedings on or prior to the 2nd day of April, 1936, unless prior to said date for good cause shown said time shall be extended, its plan of reorganization, which plan shall set forth in detail in what manner, if at all, the rights, liens and equities of creditors and stockholders will be affected by said plan, if it be confirmed.

(6) That any and all issues or matters arising in these proceedings of any nature whatsoever, be and they are hereby referred for consideration and report to Honorable Burton J. Wyman, one of the referees in bankruptcy of this court, who is hereby appointed Special Master for the purpose of hearing such issues or matters, and to report to the court under and pursuant to the directions and instructions herein set forth; provided, however, that proceedings with reference to the reports of said Special Master on the allowance or disallowance of claims of creditors and the interest of the stockholders of the debtor, are subject to the provisions of paragraph (9) hereof. Such hearing as shall be had by said Special Master upon such issues or matters presented to him, shall be had pursuant to notice to the parties entitled to receive notice thereof, and upon the conclusion of said hearing

before said Special Master, he is hereby directed and instructed to report to this court with all convenient speed, the testimony taken before him, his findings of fact, conclusions of law, and recommendations; provided, further, that such Special Master, in reference to any expenses incurred pursuant to any hearing had before him upon this reference, shall in his report make his recommendation to the court as against whom said costs and expenses shall be taxed.

(7) That the debtor be and it is hereby authorized, with the approval of the Special Master, after hearing upon notice to the parties in interest in the above entitled proceeding entitled to receive same, to compromise, adjust, or settle any [15] claims or rights which the debtor's estate may have against any person, firm or corporation, and to sell any of the assets or property of the debtor's estate herein not necessary to, or used in the business of, the estate, upon such terms and conditions as to said Special Master shall be deemed to be for the best interests of the estate; provided, however, that the amount of any such claim or right does not exceed $1,000.00, and that the reasonable value of any of the assets or properties sought to be sold by the debtor, do not exceed $1,000.00; and that said Special Master be and he is hereby empowered to require, prior to his approval, that an inventory of said property be made by a disinterested person and that appraisers be appointed to appraise and report the value thereof to said Special Master.

(8) That the claims and interests of creditors and stockholders shall be filed or evidenced and allowed in the following manner:

All claims of creditors shall be filed in the manner herein provided, on or before the 15th day of June, 1936, and unless so filed on or before said date, no such claim may participate in any plan of reorganization, except upon an order first had and obtained from the court for good cause shown; that upon the filing of claims of creditors and stockholders, in the form and manner required by law, in relation to the proving of claims in debtor's proceedings under Section 77b of the Bankruptcy Act, each of them shall be deemed finally allowed in these proceedings, unless the debtor or any creditor or stockholder of the debtor, who has intervened or shall hereafter intervene in these proceedings, prior to any payments of money thereon, shall object to the allowance of any such claims by filing an objection with the Special Master, duly verified, and give written notice thereof by mail to the claimant, or in such manner as the Special Master shall direct said objection to be given, in which event the claim [16] to which such objection is filed shall be dealt with as hereinafter provided. The nature and kind of any such objection shall not be deemed limited by anything contained in this order, the court hereby expressly reserving any right conferred by Section 77b of the Bankruptcy Act, to consider objections, or upon his own motion to scrutinize the circumstances of any assignment of future

rent claims and the amount of the consideration paid for such assignment, in determining the amount of damages allowable to the assignee and holder of such claims.

(9) The debtor, or the objector, or the claimant, may apply to the Special Master for a hearing on any such objections, and thereupon the Special Master shall fix the time for hearing the objection, of which due notice shall be given to all parties in interest herein in the manner and in the form as may be directed by the Special Master for the giving of such notice. At the time appointed for such hearing, the Special Master may require the production of such proof and the filing of such briefs in respect to the claim filed by the claimant or by the objecting party, as he may deem necessary or advisable, and if it shall appear from such proof and from such briefs that the claim ought to be expunged or reduced, the Special Master shall so report in accordance with the directions herein given for the report to be made by him pursuant to hearings had before him. Unless written exception to such report shall be filed with the Special Master by the debtor, or other objecting party, or the claimant, within ten days after the making of such report, the report of the Special Master shall stand confirmed without further order or notice. If the debtor, or other objecting party, or the claimant, shall desire to except to any report with respect to claims made by the Special Master in these proceedings, he shall file with the Special

Master written exceptions to such report, setting out the error complained of within ten days after the report is made, [17] unless prior to the expiration of such time an extension has been granted by an order of this court or by the Special Master. When such report is made by the Special Master in a contested matter, the time within which to file said written exceptions shall begin to run from the date of the service of a copy of the Special Master's report upon the adverse party. Upon the filing of such written exception, the Special Master shall forthwith certify to the Judge of this court the question presented, a summary of the evidence relating thereto, his findings of fact and conclusions of law, and transmit same to the court, together with a copy of the claim objected to and a copy of the written exception to his report filed with him.

(10) The debtor is directed to file with the Special Master on or before the date fixed by paragraph (8) hereof, a list, as of any convenient date after the filing of the original petition to reorganize herein, of the holders of the stock of said debtor, showing the classification thereof, and certified by an officer of the debtor corporation, and such filing shall be deemed to evidence the interest of the holders of said stock, their successors and assigns, for the purpose of these proceedings.

(11) For the purpose of being heard on any question arising in these proceedings, including consent to any reorganization plan, the interests

of any particular stockholder shall be evidenced by the presentation of the certificate representing the stock held by him, or by the presentation of the certificate of any bank, trust company, broker, or other depositary satisfactory to the said Special Master, stating that said stock is held for safekeeping, or otherwise, for the person or persons specified in such certificate. That for the purpose of participating in any reorganization plan, the interest of any particular stockholder shall be evidenced by the filing with the Special Master, within such period of time as the Special Master shall or may fix, [18] of certificates representing the stock held by him, or a certificate of any bank, trust company, or other depositary satisfactory to such Special Master, stating that such stock is held by such depositary subject to the order of said Special Master. Any objection to the right of any stockholder to be heard on any question arising in these proceedings, and any objection to the participation of any stockholder in any reorganization, shall be made by filing such objection with the Special Master in writing and by serving a copy of said objection upon the debtor or its attorneys.

(12) That the court reserves for future determination, as may be certified to it by said Special Master, all questions with respect to any proposed plan of reorganization, the division of creditors and stockholders of the debtor into classes according to the nature of their respective claims and in-

terests, and the effect to be given in these proceedings to the payment or non-payment to any creditor of the debtor of dividends that may or shall be hereafter declared and distributed; the court expressly reserves the right herein, and nothing herein shall be deemed to prejudice the right of the court or said Special Master, to classify said creditors in relation to their right to receive moneys distributable from the assets of the debtor, pursuant to its plan of reorganization to be hereafter filed.

(13) That the debtor shall, on or before the 2nd day of April, 1936, give notice of the making and entry of this order to all the creditors and stockholders of the debtor, as the same may appear on the books of the debtor or upon the verified schedules of creditors and stockholders filed herein by the debtor, by mailing a copy of this order, or a brief summary thereof, in form satisfactory and approved by the Special Master, to such creditors and stockholders at their addresses appearing on said books or verified schedules, and by causing the publication [19] of said brief summary to be made at least once in the San Jose Mercury Herald, a newspaper of general circulation in the County of Santa Clara, City of San Jose, State of California.

(14) That the court reserves full power, right and jurisdiction to make from time to time such orders amplifying, extending, limiting or otherwise modifying this order, as to the court may seem proper, and to give directions to the debtor as to

the preservation and conservation of its estate during the pendency of these proceedings as the court may deem necessary and proper to fully protect the rights of creditors and stockholders of said debtor.

Dated: March 12th, 1936.

HAROLD LOUDERBACK
United States District Judge.

[Endorsed]: Filed Mar. 14, 1936. [20]

EXHIBIT "C"

[Title of District Court and Cause.]

SCHEDULES OF ASSETS AND LIABILITIES OF GARDEN CITY CANNING COMPANY, A CORPORATION, DEBTOR. [21]

Schedule A-3.

CREDITORS WHOSE CLAIMS ARE UNSECURED.

[N. B.—When the name and residence (or either) of any drawer, maker, indorser or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.]

Reference to Ledger or Voucher.	Names of Creditors.	Residences, (If unknown, that fact must be stated.)	When and Where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor, with any other person, and if so, with whom.	AMOUNT $ Cts.
A1A	Anderson Stamp Co.	82 S. 2nd St., San Jose	1935	Supplies	20.93
A4A	Anderson-Barngrover Mfg. Co.,	217 W. Julian St., S. J.	1936	Labeling Machine Part	3.08
A7A	Bean, Jerome C.	25 Vine St., San Jose, Cal.	1936	Auto Tire	2.83
B1A	Butcher, Roy M.	1020 Sherwood Ave., S. J.	1934-5	Electrical Installations	350.85

Reference to Ledger or Voucher.	Names of Creditors.	Residences, (If unknown, that fact must be stated.)	When and Where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor, with any other person, and if so, with whom.	AMOUNT $	Cts.
A15A	Bay City Tying Wire Co.	540 1st St., San Francisco	Oct. 1935	Shook Tying Wire		53.00
A16A	Botelho, George	798 N. 13th St., San Jose	Jan. 1936	Coal		26.78
C3D	Calif. Container Corp.	Emeryville, Calif.	1935	Corrugated Containers		607.83
C7A	Canners League of Calif.	215 Market St., San Fran.	1935	Weighing Peaches		149.20
C1A	Chase Lumber Co. San Jose,		1936	Shook		16.30
C10A	Can Pack Machinery Co. S. J.		1935	Repairs		50.60
F5A	Farnsworth & Callahan	262 W. Sta Clara St. S. J.	1935	Auto Supplies		5.10
F4A	Fire Protection Eng'g Co.	369 Pine St., San Fran.	Jan. 1936	Watchman's Clock Dials		3.22
F6A	Fuller, W. P. Co.	361 S. 1st St., S. J.	1935	Paint		17.19
G9A	Garratt & Callahan Co.	148 Spear St., San Francisco	1935	Boiler Compound		43.26

Reference to Ledger or Voucher.	Names of Creditors.	Residences, (If unknown, that fact must be stated.)	When and Where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor, with any other person, and if so, with whom.	AMOUNT $ Cts.
G5A	Gervassio, Rudolph	264 N. 17th St., San Jose	1935	Draying	703.84
H2A	Highway Transport Co.	559 6th St., San Francisco	Dec. 1935	Express	1.66
H3B	Hohwiesner, F. & Co.	206 Sansome St., San Fran.	1935	Insurance	117.86
H5B	Haslett Warehouse Co.,	280 Battery St., San Fran.	1935	Warehousing	192.46
H4A	Heitzmann, F. A. & Son, S. J.		1936	Paint	.46
H13A	Hayden, Fred	369 Stockton Ave., S. J.	1935	Roof Repairs	34.50
L1A	Lindsay, Curtis, S. J.		1935	Stationery	2.62

Carried Forward . . Total, 2403.57

Note.—Give street number and address where possible.

[Seal] GARDEN CITY CANNING COMPANY

By G. J. GRECO, President,

Petitioner. [22]

Schedule A-3.

CREDITORS WHOSE CLAIMS ARE UNSECURED.

[N. B.—When the name and residence (or either) of any drawer, maker, indorser or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.]

Reference to Ledger or Voucher.	Names of Creditors.	Residences, (If unknown, that fact must be stated.)	When and Where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor, with any other person, and if so, with whom.	AMOUNT
					$ Cts.
				Brought Forward . . .	2403.59
M1A	Marwedel, C. W.	76 1st St., San Francisco	1935	Hardware	13.21
M4A	Modesto Transportation Co.	Modesto, Calif.	1935	Draying	16.30
M6B	Marshall-Newell Supply Co.	Spear & Mission St., S. F.	1935	Supplies	85.55
M9A	Markovitz & Fox	40 N. 4th St., San Jose	Dec. 1935	Hardware	3.86
N1BA	Federal Pitter Co.	Vernalis, Cal.	1935	Pitter Rent (Note given)	2500.00
M10A	Mignola, August & Co.,	37 S. Market St., S. J.	June 1935	Sharpen Saw	.40

Reference to Ledger or Voucher.	Names of Creditors.	Residences, (If unknown, that fact must be stated.)	When and Where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor, with any other person, and if so, with whom.	AMOUNT
N1A	Noonan, L. F. Co.	P. O. Box 1164, Sacramento	1935	Cherries for Cocktail	3145.24
N2A	National Adhesive Corp.	755 Battery St., S. F.	1936	Warehouse Supplies	6.18
P12A	Pacific Fire Ext. Co.	142 9th St., S. F.	1935	Rent Automatic Fire Alarm	90.00
P4A	Pacific Tel. & Tel. Co., S. J.		1936	Telephone Service	12.35
P5B	Pacific Gas & Electric Co.		1936	Gas and Electric Service	36.85
R6A	Rosendin Motor Works	78 Race St., San Jose	1935	Motor Repairs	23.08
R7A	Raineri Welding Works	1141 S. 1st St., S. J.	Dec. 1935	Repairs	2.75
S1D	San Jose Supply House	520 S. 1st St., San Jose	1935	Hardware Supplies	186.16
S8A	Smith Mfg. Co.,	106 Stockton Ave., S. J.	1935	Machinery Repairs	400.53
S15A	San Jose Foundry	525 San Augustine St., S. J.	1935	Repairs	84.67

Reference to Ledger or Voucher.	Names of Creditors.	Residences, (If unknown, that fact must be stated.)	When and Where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor, with any other person, and if so, with whom.	AMOUNT
S16A	San Jose Hardware Co.	S. J.	1935	Supplies	3.04
S9A	San Jose Water Works,	S. J.	1936	Water	18.00
S22A	Stuart Oxygen Co.,	211 Bay St., San Francisco	Jan 1936	Tank of Oxygen	3.91
V2A	Valley Truck Line	441 N. San Pedro St., S. J.	1935—Dec 1936—Jan.	Draying	342.46
W4A	Western Sheet Metal Works	393 W. Sta Clara St. S. J.	Nov. 1935	Repairs	6.70
W6B	Western Met. & Exp. Co.	220 Ryland St., San Jose	1935	Draying	135.10
W7A	Williams & Russo	773 W. San Carlos St. S. J.	1935	Coal and Supplies	22.99
W13A	Warren & Bailey	198 2nd St., San Francisco	1935	Thermometer Repairs	36.38
A6A	Addy, W. M.	Yuba City,	1935	YC Peaches	934.58
B4A	Bowen, J. B.	Calif. "	1935	"	633.29
E1A	Everett, P. A.	" "	1935	"	1211.97

Reference to Ledger or Voucher.	Names of Creditors.	Residences, (If unknown, that fact must be stated.)	When and Where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor, with any other person, and if so, with whom.	AMOUNT
G5A	Gloor & Farrand	Calif. City	1935	YC Peaches	4658.64
H1A	Hauck, Marie H.	" "	1935	"	75.31
H2A	Heidotting, J. J.	" "	1935	"	308.91
K1A	Karnegas, Wm.	" "	1935	"	592.52
M2A	Meschendorf & Winship	" "	1935	"	1831.71
S2A	Sutton, R. J.	" "	1935	"	435.77
S3A	Saunders, John	" "	1935	"	364.40
S4A	Smith, Press	" "	1935	"	465.21

Total, 21091.59

Note.—Give street and number address where possible.

[Seal] GARDEN CITY CANNING COMPANY

By G. J. GRECO, President,

Petitioner.

[Endorsed]: Filed Apr. 10, 1936. [23]

EXHIBIT "D"

[Title of District Court and Cause.]

PETITION FOR ORDER APPROVING SUMMARY OF ORDER OF MARCH 12, 1936.

To the Hon. Burton J. Wyman, Special Master:

The petition of Garden City Canning Company respectfully represents:

That your petitioner is the debtor in the above entitled proceedings. That on the 12th day of March, 1936, the above entitled court made and entered its order permitting your petitioner to remain in permanent possession of its assets until rejection or confirmation of its plan of reorganization or the dismissal of said [24] proceedings and directing certain steps to be taken pursuant thereto.

That on the 30th day of March, 1936, the above entitled court made and entered its order extending the time of your petitioner to file its schedules of assets and liabilities, submit its plan of reorganization, and give notice to its creditors and stockholders of the contents of said order of March 12, 1936, until the 2nd day of May, 1936.

That in said order of March 12, 1936, it is provided that your petitioner shall mail to its creditors, and cause to be published, a summary of said order of March 12, 1936, which summary shall first be submitted to the Special Master herein for approval.

That attached hereto and marked Exhibit "A",

is a summary of said order of March 12, 1936, prepared by your petitioner.

That leave has not been given to any person to intervene in these proceedings, and therefore no notice is required to be given of the hearing of this petition.

Wherefore, your petitioner prays that an order may be made and entered herein approving the form of the summary of the order of March 12, 1936, copy of which summary is attached hereto, so as to enable your petitioner to cause a copy of said summary to be published and mailed to its creditors and stockholders as required by said order of March 12, 1936; and for such further and other order as may be just and proper in the premises.

GARDEN CITY CANNING COMPANY

By G. J. GRECO

Its President.

LOUIS ONEAL, ESQ.
TORREGANO & STARK

By ERNEST J. TORREGANO

Attorneys for Debtor. [25]

United States of America
Northern District of California
County of Santa Clara—ss.

G. J. Greco, being first duly sworn, deposes and says:

That he is an officer, to-wit, President of Garden City Canning Company, a corporation, pe-

titioner herein, and is duly authorized to make this verification for and on behalf of said petitioner named and described in the foregoing petition. That he has read said petition and knows the contents thereof, and that the same are true according to the best of his knowledge, information and belief.

G. J. GRECO.

Subscribed and sworn to before me this 7th day of April, 1936.

[Seal] C. E. LUCKHARDT

Notary Public in and for the County of Santa Clara, State of California.

[Endorsed]: Filed Apr. 11, 1936. [26]

EXHIBIT "E"

[Title of District Court and Cause.]

ORDER APPROVING FORM OF SUMMARY OF ORDER OF MARCH 12, 1936.

Upon the reading, filing and consideration of the petition of the debtor above named for an order approving the form of the summary of the order made and entered by the above entitled court on the 12th day of March, 1936, so as to enable said debtor to forward a copy of said summary to its creditors and stockholders and to publish a copy thereof as is required by said order, and the court being fully advised in the premises, and this being a [27] proper case for this order, now, on motion

of Ernest J. Torregano, Esq., one of the attorneys for said debtor,

It is hereby ordered, that the form of the summary made by the debtor of the order of March 12, 1936, copy of which summary is attached hereto and marked Exhibit "A", be and the same is hereby approved as satisfactory to the undersigned Special Master.

Dated this 11 day of April, 1936.

BURTON J. WYMAN,
Special Master.

[Endorsed]: Filed Apr. 11, 1936. [28]

EXHIBIT "F"

DEBTOR'S NO. 1

10/7/38

BJW

R

[Title of District Court and Cause.]

PLAN OF REORGANIZATION

I

Classification of Creditors

Debtor's creditors fall within four classes, to-wit: (a) claims entitled to priority; (b) claims for money advanced secured by warehouse receipts on canned goods; (c) claims for property sold under conditional sales contracts; and (d) general unsecured claims.

II

Priority Claims

At the time of the filing of the proceedings for reorganization, debtor owed $669.37 on labor claims which were entitled to priority of payment. All of these claims have been paid in full in the regular course of business.

III

Claims for Money Advanced Secured by Warehouse Receipts on Canned Goods

Debtor is indebted to Pacific Can Co., 290 Division Street, San Francisco, California, in the sum of $135,083.22, which said indebtedness is secured by warehouse receipts on canned goods packed by debtor. Debtor is also indebted to Greco Canning Company, Autumn and Howard Streets, San Jose, California, in the sum of $60,837.47, secured by a second lien on the same canned goods on which Pacific Can Co. has a first lien. The value of the security is ample to pay the claim of the Pacific Can Co. in full but it is not quite sufficient to discharge the claim of Greco Canning Company. The debtor proposes to pay the claim of Pacific Can Co. in accordance with the terms of its contract with Pacific Can Co.; that is, upon canned goods being withdrawn from the warehouse, the lien of the Pacific Can Co. will be discharged. Debtor does not propose to pay anything to Greco Canning Company until the general unsecured claims are paid as provided in paragraph V hereof, and said

Greco Canning Company has executed an agreement whereby, in consideration of the approval of this plan of reorganization it will waive any payment whatsoever on its claim until all of the creditors listed in paragraph V of said plan are paid as provided in said paragraph V.

IV

Claims for Property Sold Under Conditional Sales Contract

Debtor is purchasing certain can conveyors from John Albertoli, 1197 Columbus Avenue, San Francisco, California, under a [29] contract of conditional sale, under which contract there is still a balance due said John Albertoli of $2,887.16. By reason of the fact that the value of said can conveyors is greatly in excess of the balance due under said conditional sales contract, debtor proposes to discharge said conditional sales contract at the rate of $140.00 per month commencing with the date of the entry of the order approving this plan until said balance is paid in full unless debtor is able to pay the entire balance due on the contract prior to the due date thereof, in which event debtor will obtain a 10% discount on the contract price.

V

General Unsecured Claims

The general unsecured claims against the debtor are fifty-six in number. Of these claims, fourteen

are for less than $10.00. These fourteen claims, totaling $45.81, are as follows:

Anderson-Barngrover Mfg. Co.	$	3.08
Jerome C. Bean		2.83
Farnsworth & Callahan		5.10
Fire Protection Eng'g. Co.		3.22
Highway Transport Co.		1.66
F. A. Heitzmann & Son, S. J.		.46
Curtis Lindsay		2.62
Markovitz & Fox		3.86
August Mignola & Co.		.40
National Adhesive Corporation		6.18
Raineri Welding Works		2.75
San Jose Hardware Co.		3.04
Stuart Oxygen Co.		3.91
Western Sheet Metal Works		6.70
Total	$	45.81

The remaining unsecured claims against the debtor are as follows:

Anderson Stamp Co.	$	20.93
Roy M. Butcher		350.85
Bay City Tying Wire Co.		53.00
George Botelho		26.78
California Container Corporation		607.83
Canners League of California		149.20
Chase Lumber Co.		16.30
Can Pack Machinery Co.		50.60
W. P. Fuller Co.		17.19
Garratt & Callahan Co.		43.26
Rudolph Gervassio		703.84
F. Hohweisner & Co.		117.86
Haslett Warehouse Co.		192.46
Fred Hayden		34.50
C. W. Marwedel		13.21
Modesto Transportation Co.		16.30
Marshall-Newell Supply Co.		85.55
Federal Pitter Co.		2,500.00
L. F. Noonan Co.		3,145.24

Pacific Fire Ext. Co.	90.00
Pacific Tel. & Tel. Co.	12.35
Pacific Gas & Electric Co.	36.85
Rosendin Motor Works	23.08
San Jose Supply House	186.16
Smith Mfg. Co.	400.53
San Jose Foundry	84.67
San Jose Hardware Co.	18.00
Valley Truck Line	342.46
Western Met. & Exp. Co.	135.10
Williams & Russo	22.99
Warren & Bailey	36.38
W. M. Addy	934.58
J. B. Bowen	633.29
P. A. Everett	1,211.97

[30]

Gloor & Farrand	4,658.64
Marie H. Hauck	75.31
J. J. Heidotting	308.91
Wm. Karnegas	592.52
Meschendorf & Winship	1,831.71
R. J. Sutton	435.77
John Saunders	364.40
Press Smith	465.21
Total	$21,045.78

Debtor proposes to cause to be paid to all of said general unsecured claimants, 50 per cent of the amount of their claims in the following manner, to-wit:

(a) To all claimants whose claims are less than $10.00, 50 per cent of the amount of their claim in cash upon the entry of the order approving this plan of reorganization;

(b) To all claimants whose claims are in excess of $10.00, 20 per cent of the amount of

their claim in cash upon the entry of the order approving this plan of reorganization, 10 per cent of the amount of their claims four months after the entry of the said order, ten per cent of the amount of their claims eight months after the entry of the said order, and ten per cent of the amount of their claims one year after the entry of said order.

Debtor will execute and deliver to all claimants whose claims are in excess of $10.00, three promissory notes dated as of the date of the order approving this plan of reorganization in the following form, to wit:

$..... ....., 1936

Four (4) months after date, for value received, Garden City Canning Company, a corporation, promises to pay to the order of ....., the sum of..... Dollars ($.....), being ten per cent (10%) of the amount of the claim of said payee approved and allowed in the proceedings for the reorganization of Garden City Canning Company, a corporation, in the United States District Court for the Northern District of California.

This note is payable at the office of the First National Bank of San Jose, San Jose, California.

This note bears interest at the rate of six per cent (6%) per annum from the date of maturity.

GARDEN CITY CANNING COMPANY, a corporation,

By.....

Its President.

No.....

$..... ....., 1936

Eight (8) months after date, for value received, Garden City Canning Company, a corporation, promises to pay to the order of ....., the sum of..... Dollars ($.....), being ten per cent (10%) of the amount of the claim of said payee approved and allowed in the proceedings for the reorganization of Garden City Canning Company, a corporation, in the United States District Court for the Northern District of California.

This note is payable at the office of the First National Bank of San Jose, San Jose, California.

This note bears interest at the rate of six per cent (6%) per annum from the date of maturity.

GARDEN CITY CANNING COMPANY, a corporation,

By.....

Its President.

No.....

$..... ....., 1936

One (1) year after date, for value received, Garden City Canning Company, a corporation, promises to pay to the order of ....., the sum of..... Dollars ($.....), being ten per cent (10%) of the amount of the claim of said payee approved and allowed in the proceedings for the reorganization of Garden City Canning Company, a corporation, in the United States District Court for the Northern District of California.

This note is payable at the office of the First National Bank of San Jose, San Jose, California.

This note bears interest at the rate of six per cent (6%) per annum from the date of maturity.

GARDEN CITY CANNING COMPANY, a corporation,

By.....

Its President.

No.....

Debtor proposes to borrow the money with which to make the initial cash payment to its general unsecured creditors and debtor will obtain from the parties advancing said money, an agreement whereby repayment of the money so borrowed will be deferred until the notes referred to herein be paid in full, which said agreement debtor will file with the above entitled court.

VI.

Debtor will provide for the payment in cash of all costs of administration and other allowances made by the court.

VII.

No provision is to be made for the stockholders of debtor inasmuch as debtor does not propose any change in its stock structure. Debtor will not pay any dividends to its stockholders until the notes referred to in paragraph V are paid in full.

This plan of reorganization is to become effective when consents by or on behalf of creditors holding more than two-thirds in amount of the claims against debtor, whose claims are provable and allowable and who would be affected by the plan of reorganization, are filed in the office of Honorable Burton J. Wyman, Special Master of the above entitled court, 1095 Market Street, San Francisco, California, and an order is made by the above entitled court approving this plan of reorganization.

[Corporate Seal] GARDEN CITY CANNING COMPANY, a corporation,

By G. J. GRECO

Its President

State of California,
City and County of San Francisco—ss.

On this 30th day of April, in the year One Thousand Nine Hundred and Thirty-six, before me, Louis Wiener, a Notary Public in and for the said City and County, residing therein, duly commis-

sioned and sworn, personally appeared G. J. Greco, known to me to be the President of the corporation described in and that executed the within and annexed instrument, also known to me to be the person who executed the within instrument, on behalf of the corporation therein named, and he duly acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in said City and County of San Francisco, the day and year in this certificate first above written.

[Seal] LOUIS WIENER

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires July 30, 1939. [32]

CONSENT TO PLAN OF REORGANIZATION

The undersigned, a general unsecured creditor of Garden City Canning Company, a corporation, with a provable and allowable claim in the sum of $....., hereby consents to the foregoing plan of reorganization.

.....

[33]

[Title of District Court and Cause.]

PROOF OF DEBT AND LETTER OF ATTORNEY

At....., in the.....District of....., on the.....day of....., 193....., came....., of....., in the.....County of....., in said district, personally known to me, and made oath and says:

[1] Deponent is the owner of the business known as....., and trades under that name.

[2] Deponent is one of the firm of..... ....., consisting of himself and ....., of....., in the.....county of ....., and state of....., and is duly authorized to execute the letter of attorney incorporated herein, and has executed the same on behalf of said firm.

[3] Deponent is an officer (or agent), to-wit: ....., of....., a corporation incorporated by and under the laws of the State of....., and carrying on business at ....., in the.....County of ....., and State of....., and is duly authorized to make this proof and execute the letter of attorney incorporated herein, and has executed such letter of attorney on behalf of said corporation.

[4] Deponent is the attorney (or authorized agent) of ....., in the .....County of....., and State of..... This deposition cannot be made by said principal in person because.....

.....

and deponent is duly authorized by his said principal to make this affidavit, and to execute the letter of attorney incorporated herein and has executed such letter of attorney on behalf of said principal, as it is within his knowledge that the hereinafter mentioned debt was incurred as and for the consideration hereinafter mentioned, and that such debt, to the best of his knowledge and belief, still remains unpaid and unsatisfied. [34]

The above named bankrupt, the person by or against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition and still is justly and truly indebted to claimant herein, to-wit: said....., in the sum of $....., and the nature and consideration of said debt are as follows: A balance due upon an open book account for goods sold and delivered by claimant to said bankrupt within four years last past, bills of items of which account are hereto attached as "Exhibit A" and made part hereof (5)..... No part of said debt has been paid; there are no set-offs or counterclaims to the same; and claimaint has not, nor has deponent, nor has any person by claimant's or deponent's order, or to the knowledge or belief of claimant, or deponent, for claimant's, or deponent's, use, had or received any manner of security for said debt whatever. No note has been

received for said account (except the note.....hereto attached as "Exhibit B"), nor any judgment rendered thereon (except as above stated). This claim is free from usury as defined by the laws of the State where the debt was contracted.

Claimant also herewith authorizes..... or any one of them, to represent claimant in the bankruptcy proceedings above entitled, including the voting of this claim for trustee or trustees of the estate and upon any proposal or resolution that may be submitted at a meeting of creditors, the accepting of any composition that may be offered by the bankrupt, the receiving of money due as a dividend or upon a composition or otherwise, and the receiving and waiving of notices required by Sec. 58 of the Bankruptcy Act, with full power of substitution; and claimant hereby revokes all letters of attorney heretofore given by claimant in this matter.

In witness whereof, and with the intention of having one individual signature suffice for the above deposition and this letter of attorney, said claimant has hereunto subscribed his name, or, if a corporation, has caused the subscription to be made by said officer or agent as its corporate act, or, if a partnership, has caused such subscription to be made by said member thereof on its behalf, or, if an individual or partnership acting through an agent or attorney, has caused such subscription to be made by such attorney or agent as the act of said principal, this.....day of....., 193.....

Personal signature only.....

Deponent

Claimant or as such officer, member, agent or attorney of claimant.

Subscribed, sworn to and acknowledged before me this ..... day of ....., 193.....

.....

Notary Public in and for the ....., county of ....., State of.....

(Place Notarial Seal Here)

Directions

Important

(Original notes and other writings received and copies of invoices must be attached. Mere statements are insufficient.)

If Claimant an Individual Using a Trade Name

Use bracket (1).

If Claimant a Partnership

Use bracket (2).

If Claimant a Corporation

Use bracket (3).

If Claimant an Individual Trading Under His Own Name

Ignore brackets (1) to (4) inclusive.

If Claimant an Individual or Partnership Acting by Agent

Use brackets (4). Do no make proof this way unless absolutely necessary, as sufficient reasons must be given why proof not made by Principal or same is void.

General Directions

If the consideration is not for goods sold and delivered, blank space (5) can be used to set forth the true consideration. Where the claim is based upon a promissory note, or other writing, the consideration for the same must be stated. If note is given for a cash loan, it will be necessary for the claimant to state the date the money was loaned, the amount, and compute interest up to the date of filing the petition. Consideration regarding goods sold and delivered to be stricken out when using space (5).

The signature at blank space (6) must always be that of the individual who makes the proof. No corporate, partnership, or principal's name must appear here, or the proof will be void.

EXHIBIT "G"

[Title of District Court and Cause.]

PROOF OF DEBT AND LETTER OF ATTORNEY

At Yuba City, in the Northern District of California, on the 13th day of....., 1936, came R. J. Sutton, of Yuba City, in the County of Sutter, in said district, [35]

The above named bankrupt, the person by or against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of

said petition and still is justly and truly indebted to claimant herein, to-wit: said R. J. Sutton, in the sum of $435.77, and the nature and consideration of said debt are as follows: A balance due upon an open book account for goods sold and delivered by claimant to said bankrupt within four years last past, bills of items of which account are hereto attached as—This is for the balance due under a contract of sale and purchase of Peaches delivered by claimant to the bankrupt for the season of 1935. No part of said debt has been paid; there are no set-offs or counterclaims to the same; and claimant has not, nor has deponent, nor has any person by claimant's or deponent's order, or to the knowledge or belief of claimant, or deponent, for claimant's, or deponent's, use, had or received any manner of security for said debt whatever. No note has been received for said account (except the note.....hereto attached as "Exhibit B"), nor any judgment rendered thereon (except as above stated). This claim is free from usury as defined by the laws of the State where the debt was contracted.

Claimant also herewith authorizes Chas. A. Wetmore, Jr. or any one of them, to represent claimant in the bankruptcy proceedings above entitled, including the voting of this claim for trustee or trustees of the estate and upon any proposal or resolution that may be submitted at a meeting of creditors, the accepting of any composition that may be offered by the bankrupt, the receiving of money due

as a dividend or upon a composition or otherwise, and the receiving and waiving of notices required by Sec. 58 of the Bankruptcy Act, with full power of substitution; and claimant hereby revokes all letters of attorney heretofore given by claimant in this matter.

In witness whereof, and with the intention of having one individual signature suffice for the above deposition and this letter of attorney, said claimant has hereunto subscribed his name, or, if a corporation, has caused the subscription to be made by said officer or agent as its corporate act, or, if a partnership, has caused such subscription to be made by said member thereof on its behalf, or, if an individual or partnership acting through an agent or attorney, has caused such subscription to be made by such attorney or agent as the act of said principal, this 13th day of May, 1936.

Personal signature here only

R. J. SUTTON

Deponent

Claimant or as such officer, member, agent or attorney of claimant.

Subscribed, sworn to and acknowledged before me this 13th day of May, 1936.

[Seal] FLORENCE M. HEWITT

(Place notarial seal here)

Notary Public in and for the....., county of Sutter, State of California.

Directions

Important

(Original notes and other writings received and copies of invoices must be attached. Mere statements are insufficient.)

If Claimant an Individual Using a Trade Name

Use bracket (1).

If Claimant a Partnership

Use bracket (2).

If Claimant a Corporation

Use bracket (3).

If Claimant an Individual Trading Under His Own Name

Ignore brackets (1) to (4) inclusive.

If Claimant an Individual or Partnership Acting by Agent

Use brackets (4). Do not make proof this way unless absolutely necessary, as sufficient reasons must be given why proof not made by Principal or same is void.

General Directions

If the consideration is not for goods sold and delivered, blank space (5) can be used to set forth the true consideration. Where the claim is based upon a promissory note, or other writing, the consideration for the same must be stated. If note is given for a cash loan, it will be necessary for the claimant to state the date the money was loaned, the amount, and compute interest up to the date of

filing the petition. Consideration regarding goods sold and delivered to be stricken out when using space (5).

The signature at blank space (6) must always be that of the individual who makes the proof. No corporate, partnership, or principal's name must appear here, or the proof will be void.

[Endorsed]: Filed June 4, 1936.

EXHIBIT "H"

[Title of District Court and Cause.]

PROOF OF DEBT AND LETTER OF ATTORNEY

(Before filling out blanks, please observe carefully directions on reverse.)

At Yuba City, in the Northern District of California, on the 13th day of May, 1936, came J. J. Heidotting, of Yuba City, in the.....County of Sutter, in said district, personally known to me, and made oath and says:

[1] Deponent is the owner of the business known as....., and trades under that name.

[2] Deponent is one of the firm of....., consisting of himself and....., of....., in the.....county of....., and state of....., and is

duly authorized to execute the letter of attorney incorporated herein, and has executed the same on behalf of said firm.

[3] Deponent is an officer (or agent), to wit: ....., of....., a corporation incorporated by and under the laws of the State of....., and carrying on business at....., in the.....County of ....., and State of....., and is duly authorized to make this proof and execute the letter of attorney incorporated herein, and has executed such letter of attorney on behalf of said corporation.

[4] Deponent is the attorney (or authorized agent) of ....., in the ..... County of ....., and State of ..... This deposition cannot be made by said principal in person because..... and deponent is duly authorized by his said principal to make this affidavit, and to execute the letter of attorney incorporated herein and has executed such letter of attorney on behalf of said principal, as it is within his knowledge that the hereinafter mentioned debt was incurred as and for the consideration hereinafter mentioned, and that such debt, to the best of his knowledge and belief, still remains unpaid and unsatisfied. [36]

The above named bankrupt, the person by or against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition and still is justly and truly indebted

to claimant herein, to-wit: said J. J. Heidotting, in the sum of $308.91, and the nature and consideration of said debt are as follows: A balance due upon an open book account for goods sold and delivered by claimant to said bankrupt within four years last past, bills of items of which account are hereto attached as (5) This is for the balance due under a contract of sale and purchase of Peaches delivered by claimant to the bankrupt for the season of 1935. No part of said debt has been paid; there are no set-offs or counterclaims to the same; and claimant has not, nor has deponent, nor has any person by claimant's or deponent's order, or to the knowledge or belief of claimant, or deponent, for claimant's, or deponent's, use, had or received any manner of security for said debt whatever. No note has been received for said account (except the note.....hereto attached as "Exhibit B"), nor any judgment rendered thereon (except as above stated). This claim is free from usury as defined by the laws of the State where the debt was contracted.

Claimant also herewith authorizes Chas. A. Wetmore, Jr. or any one of them, to represent claimant in the bankruptcy proceedings above entitled, including the voting of this claim for trustee or trustees of the estate and upon any proposal or resolution that may be submitted at a meeting of creditors, the accepting of any composition that may be offered by the bankrupt, the receiving of money due as a dividend or upon a composition or other-

wise, and the receiving and waiving of notices required by Sec. 58 of the Bankruptcy Act, with full power of substitution; and claimant hereby revokes all letters of attorney heretofore given by claimant in this matter.

In witness whereof, and with the intention of having one individual signature suffice for the above deposition and this letter of attorney, said claimant has hereunto subscribed his name, or, if a corporation, has caused the subscription to be made by said officer or agent as its corporate act, or, if a partnership, has caused such subscription to be made by said member thereof on its behalf, or, if an individual or partnership acting through an agent or attorney, has cause such subscription to be made by such attorney or agent as the act of said principal, this 13th day of May, 1936.

Personal signature here only (6)

J. J. HEIDOTTING

Deponent

(Do not sign Firm or Corporate Name)

Claimant or as such officer, member, agent or attorney of claimant.

Subscribed, sworn to and acknowledged before me this 13th day of May, 1936.

[Seal] FLORENCE M. HEWITT

(Place notarial seal here)

Notary Public in and for the....., county of Sutter, State of California.

Directions

Important

(Original notes and other writings received and copies of invoices must be attached. Mere statements are insufficient.)

If Claimant an Individual Using a Trade Name.

Use bracket (1).

If Claimant a Partnership

Use bracket (2).

If Claimant a Corporation

Use bracket (3).

If Claimant an Individual Trading Under His Own Name

Ignore brackets (1) to (4) inclusive.

If Claimant an Individual or Partnership Acting by Agent

Use brackets (4). Do not make proof this way unless absolutely necessary, as sufficient reasons must be given why proof not made by Principal or same is void.

General Directions

If the consideration is not for goods sold and delivered, blank space (5) can be used to set forth the true consideration. Where the claim is based upon a promissory note, or other writing, the consideration for the same must be stated. If note is given for a cash loan, it will be necessary for the claimant to state the date the money was loaned, the amount, and compute interest up to the date of filing the petition. Consideration regarding goods

sold and delivered to be stricken out when using space (5).

The signature at blank space (6) must always be that of the individual who makes the proof. No corporate, partnership, or principal's name must appear here, or the proof will be void.

[Endorsed]: Filed June 4, 1936.

EXHIBIT "I"

[Title of District Court and Cause.]

PROOF OF UNSECURED DEBT.

At Yuba City, in said District of California, on the 29th day of February, A. D. 1936, came John Saunders, of Yuba City, in the County of Sutter, in said District of California, and made oath, and says that Garden City Canning Company, a corporation, the person by (against) whom a petition for Adjudication of Bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent, in the sum of Fifteen Hundred Seventy-seven and 70/100 Dollars; that the consideration of said debt is as follows: Balance due under contract on sale of Tuscan peaches for year 1935, that no part of said debt has been paid (except.....); that there are no set-offs or counterclaims to the same (except .....); and that deponent has not, nor has any person by his order, or to his knowledge or belief

for his use, had or received any manner of security for said debt whatever.

And deponent further says that no note has been received for such account, nor any judgment rendered thereon.

JOHN SAUNDERS

Creditor.

Subscribed and sworn to before me, this 29th day of February A. D. 1936.

[Seal] LOYD E. HEWITT
Court Commissioner of Sutter County, California
(Official Character.)

[Reverse not filled in.]

[Endorsed]: Filed Jun. 4, 1936. [37]

EXHIBIT "J"

[Title of District Court and Cause.]

PROOF OF UNSECURED DEBT.

At Yuba City, in said District of California, on the 29th day of February, A. D. 19....., came J. B. Bowen, of *Bakerfield,* in the County of Kern, in said District of California and made oath, and says that Garden City Canning Company, a corporation the person by (against) whom a petition for Adjudication of Bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent, in the sum of

Six Hundred and Twenty-five Dollars; that the consideration of said debt is as follows: Balance due on sale of Palore Peaches for the year 1935 that no part of said debt has been paid (except.....); that there are no set-offs or counterclaims to the same (except.....); and that deponent has not, nor has any person by his order, or to his knowledge or belief for his use, had or received any manner of security for said debt whatever.

And deponent further says that no note has been received for such account, nor any judgment rendered thereon.

J. B. BOWEN

Creditor.

By W. M. ADDY

Subscribed and sworn to before me this 29th day of February, A. D. 1936.

[Seal] FLORENCE M. HEWITT

Notary Public

(Official Character.)

[Reverse not filled in.]

[Endorsed]: Filed June. 4, 1936. [38]

EXHIBIT "K"

[Title of District Court and Cause.]

PROOF OF UNSECURED DEBT.

At Yuba City, in said District of California, on the 29th day of February, A. D. 1936, came W. M.

Addy, of Yuba City, in the County of Sutter, in said District of California and made oath, and says that Garden City Canning Company the person by (against) whom a petition for Adjudication of Bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent, in the sum of Nine Hundred Thirty-four and 57/100 Dollars; that the consideration of said debt is as follows: Balance due under contract on sale of Peaches for year 1935 that no part of said debt has been paid (except .....); that there are no set-offs or counterclaims to the same (except.....); and that deponent has not, nor has any person by his order, or to his knowledge or belief for his use, had or received any manner of security for said debt whatever.

And deponent further says that no note has been received for such account, nor any judgment rendered thereon.

W. M. ADDY

Creditor.

Subscribed and sworn to before me this 29th day of February, A. D. 1936.

[Seal] FLORENCE M. HEWITT

Notary Public

(Official Character.)

[Reverse not filled in.]

[Endorsed]: Filed Jun. 4, 1936. [39]

EXHIBIT "L"

[Title of District Court and Cause.]

PETITION FOR CONFIRMATION OF REORGANIZATION PLAN

To Honorable Burton J. Wyman, Special Master of the Above Entitled Court:

The petition of Garden City Canning Company, a corporation, the debtor herein, respectfully shows:

That on the 6th day of February, 1936, your petitioner filed its petition herein under and pursuant to the provisions of Section 77-B of the Bankruptcy Act for leave to submit a plan of reorganization; that on the 6th day of February, 1936, this court made its order approving said petition as properly filed and per- [40] mitting the debtor to remain in possession of its property and assets, and directing it to give notice to its creditors and stockholders of a hearing to be held on the 2nd day of March, 1936, for the purpose of determining whether a trustee should be appointed or whether the debtor should be allowed to remain in possession, notice of which said hearing was duly given by mail and by publication as in and by said order directed.

That thereafter and on or about the 14th day of February, 1936, your petitioner filed a list of all known creditors of or claimants against debtor or its property, and the last known postoffice address of each; also a list of debtor's stockholders, with their respective last known addresses.

That at the aforesaid hearing on the 2nd day of March, 1936, the court ordered that the debtor be

permitted to remain in permanent possession of its assets until the rejection or confirmation of its plan of reorganization or the dismissal of the proceedings, and referred all proceedings in connection with said reorganization to Honorable Burton J. Wyman, as Special Master.

That by said order of March 2nd, 1936, all creditors of debtor were directed to file proofs of claim with said Special Master on or before the 15th day of June, 1936, notice whereof was given all creditors by mail and by publication as in and by said order provided.

That on or about the 6th day of April, 1936, pursuant to the aforesaid order of March 2nd, 1936, petitioner filed a schedule of its assets and liabilities.

That none of the shares of stock in the debtor corporation have been transferred after the commencement or in contemplation of this proceeding.

That on the 1st day of May, 1936, petitioner presented a proposed plan of reorganization.

That thereafter there were filed in these proceedings con- [41] sents of general unsecured creditors having claims aggregating $18,108.13, constituting more than two-thirds in amount of all filed claims; that Pacific Can Company, a secured creditor, is not affected by said plan of reorganization; that attached hereto and marked Exhibit "A" is the agreement of the Greco Canning Company for the subordination of its claim as in said plan provided;

that John Albertoli, a creditor holding a conditional sales contract, has filed his consent to said plan of reorganization; that none of the stockholders of debtor are affected by the plan of reorganization.

That annexed hereto and made a part hereof and marked Exhibit "B" is a list of all proofs of claim which have been filed herein within the time within which claims could be filed; that none of said claims are entitled to priority of payment.

That the offer and its acceptance are in good faith and have not been made or procured by any means or promises forbidden by the Bankruptcy Act.

That all amounts to be paid by the debtor are fully disclosed by the proposed reorganization plan with the exception of the expenses of administration to be fixed by the court and to be paid in cash on the confirmation of the plan and the fee to your petitioner's attorneys; that your petitioner has paid its attorneys the sum of Twenty-five Hundred Dollars ($2500.00), which sum your petitioner alleges is a fair and reasonable fee to them.

That said reorganization plan is fair and equitable and does not discriminate unfairly in favor of any class of creditors; that it is feasible and complies with the provisions of Section 77-B of the Bankruptcy Act.

That your petitioner has not rejected any unexpired leases and that there were no executory con-

tracts outstanding at the time of the filing of the petition herein, with the exception of a lease from the Greco Canning Company to your petitioner.

[42]

Wherefore, your petitioner prays that a meeting of creditors be called and held herein to consider said plan; that the form of notice to creditors attached hereto and marked Exhibit "C" be approved by the court; that at said meeting of creditors said plan of reorganization be examined and that an order be made confirming said plan, and for such further and other order as may be just and proper in the premises.

GARDEN CITY CANNING COMPANY,
a corporation
By G. J. GRECO
Its President

LOUIS ONEAL and
TORREGANO & STARK
By ERNEST J. TORREGANO
Attorneys for Debtor.

United States of America
Northern District of California
County of Santa Clara—ss.

G. J. Greco, being first duly sworn, deposes and says:

That he is an officer, to-wit, President of the corporation named in the foregoing Petition, and duly

authorized to make this verification for and on behalf of said corporation;

That he has read said petition, knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

G. J. GRECO

Subscribed and sworn to before me this 2nd day of October, 1936.

[Seal] C. E. LUCKHARDT

Notary Public in and for the County of Santa Clara, State of California. [43]

EXHIBIT "B"

LIST OF UNSECURED CLAIMS ON FILE

Food Machinery Co.	$ 3.08
Jerome C. Bean	2.83
Fire Protection Eng'g Co.	3.22
Markovitz & Fox	3.86
National Adhesive Corporation	6.18
San Jose Hardware Co.	3.04
Anderson Stamp Co.	20.93
Roy M. Butcher	350.85
Bay City Tying Wire Service Co.	53.00
George Botelho	26.78
California Container Corporation	607.83
Canners League of California	149.20
Chase Lumber Co.	16.30
Can Pack Machinery Co. Inc.	50.60
W. P. Fuller Co.	17.19
Garratt & Callahan Co.	43.26
Rudolph Gervassio	703.84
F. Hohwiesner & Co.	22.21
Fred Hayden	34.50
C. W. Marwedel	13.21
Marshall-Newell Supply Co.	85.64
Federal Pitter Co.	2,562.50
L. F. Noonan Co. Inc.	3,145.24

Pacific Fire Ext. Co.	90.00
San Jose Supply House	186.16
J. S. Smith Mfg. Co.	400.53
San Jose Foundry	84.67
Valley Truck Line	342.46
Western Met. & Exp. Co.	135.10
Warren & Bailey	36.38
P. A. Everett	1,211.97
Gloor & Farrand	4,668.32
Marie H. Hauck	75.31
Meschendorf & Winship	2,969.13
Press Smith	1,163.00
Total	$19,288.32

[Endorsed]: Filed Nov. 4, 1936. [44]

EXHIBIT "M"

[Title of District Court and Cause.]

ORDER CALLING MEETING OF CREDITORS AND APPROVING FORM OF NOTICE THEREOF

The debtor above named having filed herein its petition for confirmation of the reorganization plan heretofore filed by it and having prayed that a meeting of creditors be called to examine said plan and having tendered a form of notice thereof,

It Is Hereby Ordered that a meeting of creditors of Garden City Canning Company be held on the 16 day of November, 1936, at the hour of 2 o'clock ..... M. of said day, at the office of the undersigned, Room 609 Grant Building, 1095 Market Street, San Francisco, California. [45]

It Is Further Ordered that the form of notice attached to said debtor's petition for confirmation of reorganization plan be and the same is hereby approved.

Dated this 4 day of November, 1936.

BURTON J. WYMAN
Referee in Bankruptcy, as
Special Master

[Endorsed]: Filed Nov. 4, 1936. [46]

EXHIBIT "N"

[Title of District Court and Cause.]

SPECIAL MASTER'S REPORT RECOMMENDING CONFIRMATION OF REORGANIZATION PLAN.

To Honorable Harold Louderback, Judge of the United States District Court for the Northern District of California:

The undersigned, to whom the above entitled proceedings in reorganization were referred for consideration and report, hereby reports to the court as follows:

That on the 1st day of May, 1936, the debtor above named filed with the clerk of the above entitled court its plan of reorganization wherein and whereby said debtor proposed to pay to all of its general unsecured creditors 50% of the amount of their claims in the following manner: [47]

To all claimants whose claims are less than $10.00, 50% of the amount of their claim in cash upon the entry of the order approving the plan of reorganization;

To all other general unsecured creditors, 20% of the amount of their claims in cash upon the entry of said order, 10% of the amount of their claims four months thereafter, 10% eight months thereafter, and 10% of the amount of their claims one year after the entry of said order, said deferred payments to be represented by promissory notes.

And wherein and whereby said debtor proposed to discharge its indebtedness due to secured creditors as follows:

To pay the claim of Pacific Can Co. in accordance with the terms of its contract with Pacific Can Co.;

Not to pay anything to Greco Canning Company until the general unsecured creditors are paid as provided for in said plan; and

To pay John Albertoli on his secured claim at the rate of $140.00 a month commencing with the date of the order approving the plan.

That pursuant to notice given by said debtor to its creditors, thirty-five creditors of said debtor filed and propounded herein their claims, which said claims amount to the sum of $19,288.32; a list of said claims is attached to the petition for confirmation of reorganization plan forwarded with this report.

That general unsecured creditors having claims aggregating $18,108.13, constituting more than two-thirds in amount of all filed claims, have filed their consents to the said plan of reorganization.

That only two creditors failed to file consents to said plan of reorganization, namely, Press Smith with a claim of $1163.00, and W. P. Fuller & Co., with a claim of $17.19. That Pacific Can Co is not affected by this plan of reorganization, and that a consent of said Pacific Can Co. to said plan of reorganization is unnecessary; that Greco Canning Company and John Albertoli have filed their consents to said plan of reorganization.

That thereafter, said debtor filed with me its petition for confirmation of reorganization plan, which said petition is transmitted herewith. [48]

That thereafter, I made an order calling a meeting of the creditors of said debtor to be held on the 16th day of November, 1936, at the hour of 2:00 o'clock P. M. of said day for the purpose of examining and passing upon said plan of reorganization; that pursuant to said order, said debtor gave ten days notice in writing to each of its creditors and stockholders of said meeting, and on the day set for said meeting Mr. G. J. Greco, the president of debtor corporation, was examined by me; that none of the creditors of said debtor appeared at said meeting.

That the petition for reorganization under and pursuant to the provisions of Section 77-b of the Bankruptcy Act was filed on the 6th day of Feb-

ruary, 1936, and that on said day an order was made approving said petition as properly filed and permitting the debtor to remain in possession of its property and assets and directing it to give notice to its creditors and stockholders of a hearing to be held on the 2nd day of March, 1936, for the purpose of determining whether a trustee should be appointed or whether the debtor should be allowed to remain in possession; that at the aforesaid hearing on the 2nd day of March, 1936, the court ordered that the debtor be permitted to remain in possession of its assets until the rejection or confirmation of its plan of reorganization or the dismissal of the proceedings and referred all proceedings in connection with the said reorganization to the undersigned as special master.

That by said order of March 2, 1936, all creditors of the debtor were directed to file proofs of claim with said special master on or before the 15th day of June, 1936, notice whereof was duly given by the debtor to all creditors by mail and published as and by said order provided; that on the 10th day of April, 1936, pursuant to the aforesaid order of March 2, 1936, the debtor filed a schedule of its assets and liabilities; that none of the shares of stock in the debtor corporation have been transferred after the commencement or in contempla-
[49] tion of this proceeding; that it appeared from the testimony of G. J. Greco that the offer and acceptance were made in good faith and have not been made or procured by any means or promises

forbidden by the Bankruptcy Act, and that said reorganization plan is fair and equitable and does not discriminate unfairly in favor of any creditor or creditors, and that it is feasible and complies with the provisions of Section 77-b of the Bankruptcy Act.

That said debtor has not rejected any unexpired leases and that there were no executory contracts outstanding at the time of the filing of the petition herein, with the exception of a lease from the Greco Canning Company to said debtor.

That the amounts to be paid by the debtor are fully disclosed by the reorganization plan, with the exception of the expenses of administration to be paid in cash on the confirmation of the plan and the fee to the attorneys for said debtor; that said debtor has paid its attorneys the sum of $2,-500.00, which is a fair and reasonable fee to them.

That Press Smith, a creditor of said debtor who has filed his claim with me, prior to the commencement of these proceedings commenced a suit against the debtor in the Superior Court of the State of California, in and for the County of Yuba, and caused an attachment to be levied on moneys deposited to the credit of the debtor with the Anglo-California National Bank of San Francisco, which said attachment should be ordered released.

That Yuba Gardens, prior to the filing of the petition for reorganization filed an action against the debtor to recover the sum of $540.47; that the debtor failed to schedule Yuba Gardens as a cred-

itor by reason of the fact that the account of said Yuba Gardens appeared on the books of said debtor as fully paid; that for the purpose of these proceedings the debtor is willing to recognize the claim of Yuba Gardens, and to pay said Yuba Gardens on the same basis that it is paying its creditors pursuant to said plan of reorganization, and the undersigned recommends that the debtor be given leave to so pay said Yuba Gardens. [50]

That the debtor has presented to me the form of order approving the plan of reorganization which it proposes to present to the court. I have examined the same and have found it to be satisfactory. A copy of said proposed order is attached hereto and marked Exhibit "A".

Compensation and Expenses of Special Master

It is my opinion that the sum of $25.00 for one hearing, and the preparation of this certificate and report is reasonable compensation to be allowed for my services as special master herein, and I respectfully request such allowance. My expenses as special master, including the fee of the stenographic reporter and office and clerical charges amount to $15.00 which I believe to be a reasonable allowance therefor, and I respectfully request such allowance.

Recommendations of Special Master

In view of the fact that all parties affected by the proposed plan of reorganization are practically in unanimous accord therewith, I am of the opinion that the proposed order, (a copy of which is attached hereto), wherein the approval of the pro-

posed plan of reorganization is sought to be decreed, should be made the order of this court, and I hereby recommend the signing of the original of said order.

Papers Handed Up Herewith

I hand up herewith the following papers:

(1) Affidavit of Publication;

(2) Notice to Creditors and Stockholders of Entry of Order;

(3) Consent of Meschendorf & Winship and Charles S. Gloor and Charles H. Farrand to plan of reorganization;

(4) Acceptances of Plan of Reorganization;

(5) Petition for Confirmation of Reorganization Plan;

(6) Order Calling Meeting of Creditors and Approving Form of Notice Thereof;

(7) Notice to Creditors of Hearing on Plan; and

(8) Envelope containing miscellaneous papers.

Dated: December 2, 1936.

Respectfully submitted,

BURTON J. WYMAN,

Special Master.

[Endorsed]: Filed Dec. 2, 1936. [51]

EXHIBIT "O"

[Title of District Court and Cause.]

ORDER APPROVING PLAN OF REORGANIZATION.

This cause coming on to be heard upon motion of the debtor herein and in accordance with the report of Honorable Burton J. Wyman, Referee in Bankruptcy and Special Master in the above entitled cause, for the approval of the report of said special master in relation to the reference to him in the above entitled cause, the debtor appearing by Messrs. Louis Oneal and Torregano & Stark, and no adverse interests appearing, and the court having examined the report of the special master and being fully advised in the premises,

It Is Hereby Ordered that the report of Honorable Burton J [52] Wyman, Referee in Bankruptcy and Special Master, be and the same is hereby fully approved and confirmed to stand as the findings of this court.

It is Further Ordered that the plan of reorganization proposed by the debtor and accepted by creditors holding claims exceeding two-thirds in amount of all claims filed in these proceedings be and the same is hereby approved.

It Is Further Ordered that the debtor proceed forthwith to execute and carry into effect the said plan of reorganization as so approved and confirmed by paying all of the expenses of administration, including the fee of the special master

as set forth in said special master's report and by delivering to all its general unsecured creditors the cash consideration and the promissory notes provided for in said plan of reorganization, and to otherwise perform and carry out and cause to be performed and carried out all of the acts and transactions on its part required to be performed and carried out pursuant to said plan of reorganization.

It is Further Ordered that the attachment issued in that certain action commenced by Press Smith against the debtor above named in the Superior Court of the State of California in and for County of Yuba, and levied upon funds belonging to said debtor in the possession of the Anglo-California National Bank of San Francisco, be and the same is hereby vacated and said The Anglo-California National Bank of San Francisco be and it is hereby authorized and directed to deliver said funds held by it pursuant to said writ of attachment to the debtor above named.

It Is Further Ordered that the debtor report in writing to this court within one week from the date of this order all acts and things done and performed by it in the carrying out of said plan, and that said debtor render a final report in writing to this court of all things done and performed by it in the carrying [53] out of said plan within fifty-four weeks from the date of this order.

Done In Open Court this 15th day of December, 1936.

HAROLD LOUDERBACK
United States District Judge.

[Endorsed]: Filed Dec. 15, 1936. [54]

EXHIBIT "P"

[Title of District Court and Cause.]

REPORT OF DEBTOR OF COMPLETE EXECUTION AND ACCOMPLISHMENT OF CONFIRMED PLAN OF REORGANIZATION AND PETITION FOR FINAL DECREE.

Now comes the debtor above named and presents this its report of compliance with the terms and provisions of the plan of reorganization heretofore confirmed by this court, and respectfully shows to the court:

That all costs of administration, claims entitled to priority of payment, and other allowances as fixed by order of this court, together with attorneys' fees, have been paid;

That your petitioner has paid all of its secured claims [55] as provided for in the plan of reorganization heretofore confirmed by the above entitled court;

That your petitioner has paid to all of its general unsecured creditors whose claims were less than $10.00, 50% of the amount of their claim in cash immediately following the entry of the order approving the plan of reorganization;

That your petitioner has paid to the remaining unsecured creditors 20% of the amount of their claims in cash, and has paid in full the notes executed and delivered to said creditors pursuant to the plan of reorganization for an additional 30% of their claims;

That no provisions were made in the plan of reorganization for the stockholders of the debtor, inasmuch as the debtor did not propose any change in its stock structure;

Wherefore, the debtor prays that this court enter a final decree:

(a) Approving this report;

(b) Finding and decreeing that the plan of reorganization heretofore confirmed has been fully executed, accomplished and carried out in accordance with all of the terms and provisions of said plan of reorganization and the orders of this court in connection therewith;

(c) Discharging the debtor from all of its debts, claims and liabilities, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy;

(d) Terminating and finally closing the above entitled proceedings;

(e) And for such further and other order as may be just and proper in the premises.

GARDEN CITY CANNING COMPANY,
a corporation.
By G. J. GRECO,
Its President.

LOUIS ONEAL
TORREGANO & STARK,
Attorneys for Debtor. [56]

United States of America
Northern District of California
County of Santa Clara—ss.

G. J. Greco, being first duly sworn, deposes and says:

That he is an officer, to-wit, President of the corporation named in the foregoing Report of Debtor, and duly authorized to make this verification for and on behalf of said corporation;

That he has read said report, knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

G. J. GRECO.

Subscribed and sworn to before me this 11th day of January, 1938.

[Seal] ZOE WECKLEM,
Notary Public in and for the County of Santa Clara, State of California.

[Endorsed]: Filed Jan. 12, 1938. [57]

EXHIBIT "Q"

[Title of District Court and Cause.]

CERTIFICATE AND REPORT OF SPECIAL MASTER ON OBJECTION TO REPORT AND FINAL DISCHARGE OF DEBTOR

To Honorable Harold Louderback, United States District Judge for the Northern District of California:

I, Burton J. Wyman, one of the referees in bankruptcy of this court to whom, as special master, was referred the petition of certain creditors objecting to report and final discharge of the above named debtor, with directions to make findings of fact, report, recommendations and conclusions of law, respectfully certify and report:

On the 22nd day of January, 1938, the following verified petition was filed in this court: [58]

"The petition of John Saunders, W. M. Addy, J. B. Bowen, R. J. Sutton and J. J. Heidothing, by their attorney Loyd E. Hewitt, respectfully shows, and said petitioner alleges:

"I.

"That on the 6th day of February, 1936, Garden City Canning Company, a corporation, who is the above named debtor, filed with the above entitled court its petition for reorganization under Section 77b of the Acts of Congress relating to bankruptcy; that thereafter and on February 8th, 1936, the above entitled

court made its order approving the debtor's petition; that thereafter and on March 3rd, 1936, there was filed with the above entitled court the debtor's verified schedule of creditors and stockholders, and among the creditors were the names of the petitioners herein set forth and their addresses; that thereafter and on the 14th day of March, 1936, the above entitled court made its order permitting the debtor to remain in permanent possession of its assets until rejection or confirmation of its plan of reorganization, or dismissal of the proceedings that thereafter and on the 10th day of April, 1936, the above named debtor filed with the above entitled court its schedule of assets and liabilities, and amongst its liabilities mentioned the names of all of the petitioners and the amounts which it owed said petitioners, except that the amount set after the name of John Saunders was less than the amount due him from said debtor; that thereafter and on the 20th day of April, 1936, the affidavit of publication of notice to creditors and stockholders was filed with the above entitled court; [59] that thereafter and on the 1st day of May, 1936, the above named debtor filed with the above entitled court its plan of reorganization, setting forth the names of the petitioners herein with the amounts due said petitioners, except that the amount set after the name of John Saunders as due him was

less than the amount actually due said John Saunders; that thereafter and on the 30th day of July, 1936, there was filed with the above entitled court acceptance of the plan of reorganization by said creditors; that thereafter and on November 4th, 1936, the petition of the above named debtor for confirmation of its reorganization plan was filed with the above entitled court; that thereafter and on November 4th, 1936, the above entitled court made its order calling a meeting of the creditors and approving the form of notice thereof to examine said plan of reorganization, and set the date of said hearing for the 16th day of November, 1936, at the hour of 2:00 o'clock P. M.; that thereafter and on the 2nd day of December, 1936, Honorable Burton J. Wyman, a referee in bankruptcy, filed with the above entitled court his special master's report recommending the confirmation of the reorganization plan of the above named debtor; that thereafter and on December 15th, 1936, the above entitled court made its order approving the plan of reorganization of the above named debtor; that thereafter and on the 12th day of January, 1938, the above entitled court made its order that notice be given to creditors approving the former and notice for hearing debtor's report of complete execution and accomplishment of the confirmed plan of reorganization. [60]

"II.

"That on the 4th day of June, 1936, W. M. Addy filed with the above entitled court his proven claim against the debtor in the sum of $934.57; that on the 4th day of June, 1936, John Saunders filed with the above entitled court his proven claim against the debtor in the sum of $1577.70; that on the 4th day of June, 1936, J. B. Bowen filed with the above entitled court his proven claim against the debtor in the sum of $625.00; that on the 4th day of June, 1936, R. J. Sutton filed with the above entitled court his proven claim against the debtor in the sum of $435.77; that on the 4th day of June, 1936, J. J. Heidothing filed with the above entitled court his proven claim against the debtor in the sum of $308.91.

"III.

"That according to the notice to creditors hereinbefore mentioned in paragraph I hereof, the petitioners as creditors of the above named debtor had to and including the 15th day of June, 1936, within which to file their said claims against said debtor.

"IV.

"That all of the creditors of said debtor with the exception of your petitioners have received the amount due them according to the plan of reorganization which was confirmed by the above entitled court as in paragraph I hereof

set forth, and that your said petitioners have received nothing in payment of their said claims.

"Wherefore, your petitioners pray that said report be not accepted or approved; that said debtor be not discharged; that the above entitled court make its order that before said debtor is finally discharged that it be caused to pay to said petitioners, and each of them, the [61] amount due said petitioners according to their proven claim on the same percentage basis on which the other unsecured creditors of said debtor were paid, and for such other and further relief as to this court may seem meet and equitable in the premises.

"LOYD E. HEWITT
"Attorney for Petitioners".

"State of California,
"City and County of San Francisco—ss.

"Loyd E. Hewitt, being duly sworn, deposes and says:

"That he is the attorney for the petitioners named in the within petition; that he has read the above and foregoing petition, and the same is true of his own knowledge, except as to matters therein stated on his information and belief, and as to those matters he believes it to be true; that he makes this verification on behalf of said petitioners for the reason that he has a better knowledge of what has happened than said petitioners, and for the further reason

that he is now in the City and County of San Francisco and is not in the county in which said petitioners reside.

"LOYD E. HEWITT

"Subscribed and sworn to before me this 22nd day of January, 1938.

[Seal] EMI EGGERS DEL BONO

"Notary Public in and for the City and County of San Francisco, State of California."

(See original thereof on file in the office of the clerk of this court.) [62]

Thereafter, and on the 24th day of January, 1938, the following affidavit in support of said petition was filed in said court:

"State of California,

"City and County of San Francisco—ss.

"Loyd E. Hewitt being duly sworn deposes and says: that he is an attorney-at-law and entitled to practice law in all of the Courts of the State of California, and in the United States District Court in the Northern District of California; that he filed the several claims of John Saunders, W. M. Addy, J. B. Bowen, R. J. Sutton and J. J. Heidothing, against the above named debtor, with the clerk of the above entitled court, in San Francisco, California on the fourth day of June 1936; that said claims were mailed by the said Loyd E. Hewitt to the Clerk of the United States District Court, at San Francisco, California; that said Clerk, by

his deputy, acknowledged receipt of said claims on the fourth day of June, 1936, by making a notation at the bottom of the letter herein before mentioned; that a copy of said letter with said notation is attached hereto, marked exhibit "A", and made a part hereof by reference; that prior to the 12th day of November, 1936, this affiant received notice of a creditors meeting to hear the reorganization plan of the above named debtor to be held before the Hon. Burton J. Wyman on the 16th day of November, 1936, at 2 o'clock P. M.; that on the 12th day of November, 1936, this affiant wrote and mailed a letter, postage prepaid, addressed to Hon. Burton J. Wyman, Referee in Bankruptcy, at 609 Grant Building, San Francisco, California; that said letter [63] was deposited in the U. S. mail at the Post Office in Yuba City, California; that there is a regular daily communication by mail between said city of Yuba, California and the city of San Francisco, California; that a copy of said letter is hereunto attached marked exhibit "B" and made a part hereof by reference; that this affiant never received an answer to said letter, nor was he ever informed that said claims herein before mentioned had never been delivered to said Hon. Burton J. Wyman, special master in the above entitled matter, by the clerk, as required by law; that on or about the 10th day of August 1937, this affiant learned that

some of the other creditors of the above named debtor, had received payments on their claims and that the claimants for whom this affiant filed claims had received nothing in payments on their claims; that on the 10th day of August 1937, this affiant mailed a letter addressed to Hon. Burton J. Wyman, Referee in Bankruptcy at 609 Grant Building, San Francisco, California, that postage on said letter was prepaid and said letter was mailed at the United States Post Office in the City of Yuba City, California; that a copy of said letter is attached hereto, marked exhibit "C" and made a part hereof; that this affiant never received an answer to said letter; that the office of said Hon. Burton J. Wyman is at 609 Grant Building, San Francisco, California, and was at said address since and before the 12th day of November, 1936, that on the same day, to-wit; the 10th day of August, 1937, this affiant mailed a letter to the Clerk of the United States District Court at San Francisco, California, a copy of which said letter is attached hereto marked exhibit "D" and made a part hereof by reference; that this affiant received a letter in answer to this last [64] mentioned letter signed by a deputy clerk of the United States District Court for the Northern District of California, that a copy of said letter is attached hereto, marked exhibit "E" and made a part hereof by reference; that said claims filed by

this affiant are still on file with the Clerk of the above entitled court, that the affiant called at the office of said Hon. Burton J. Wyman, in the fall of 1937 to inquire why the claims mentioned herein, had not been paid, on the first two of these occasions he was unable to contact the said Hon. Burton J. Wyman, but on the third call he met the said Hon. Burton J. Wyman and this affiant was informed, by him, that the reason said claims had not been paid was because he had never received them, that this affiant makes this affidavit in support of the petition filed by him, in the above entitled matter on the 22nd day of January, 1938; which said petition objects to the discharge of the above named debtor and prays for relief for the claimants mentioned herein who have not been paid on their said claims.

"LOYD E. HEWITT

"Subscribed and sworn to before me this 24th day of January, 1938.

"[Seal] JANE O'CONNOR

"Notary Public in and for the City and County of San Francisco, State of California."

"EXHIBIT 'A'

"June 3d, 1936.

"Clerk of the United States District Court, of the Northern District of California, San Francisco, California.

"Dear Sir:—Re: Garden City Canning Company, Debtor. [65]

"Enclosed please find the claims of W. M. Addy, in the sum of $934.57; of John Saunders in the sum of $1577.70; of J. B. Bowen, in the sum of $625.00; of R. J. Sutton, in the sum of $435.77 and J. J. Heidotting in the sum of $308.91, all claims being against the above named bankrupt or debtor, Garden City Canning Company, a corporation.

"Will you please file the same and see that they are referred to the proper referee. The last day of filing is June 15th, 1936.

"Will you kindly acknowledge receipt of said claims for my record, and if there is any charge for the filing or sending of the acknowledgement kindly bill me for the same.

"If these are not in proper form will you return them to me by return mail at my expense, stating in what portion they should be amended or corrected?

"Thanking you very kindly in advance for your attention in this matter, I am,

"Yours very truly,

"LEH/FH "LOYD E. HEWITT."

"6/4/36

"Dear Sir:

"This will acknowledge receipt of the five claims mentioned above in the matter of Garden City Canning Co., Debtor.

"Yours very truly,

"W. B. MALING, Clerk.
"By C. M. TAYLOR,
Deputy Clerk"

"EXHIBIT 'B'

"November 12th, 1936

"Hon. Burton J. Wyman,
"Referee in Bankruptcy,
"609 Grant Building,
"San Francisco, California.

"Dear Sir:—Re: Garden City Canning Company No. 26284 L.

"I received a notice to creditors of a hearing of a reorganization plan of the above named debtor which takes place on the 16th day of November, 1936, at 2 o'clock P. M. [66]

"I represent several creditors in this company who have not agreed to the reorganization plan, namely, Saunder, Addy and Bowman.

"I will be unable to be present on the 16th as I am in Court here on that date.

"Will you be kind enough to advise me the amount of debts against the corporation and of those who voted in favor of your organization and the amount of the claims which each of them have against the debtor?

"Thanking you very kindly in advance, I am,

"Yours very truly,

"LEH/FH "LOYD E. HEWITT"

"EXHIBIT 'C'

"August 10, 1937

"Hon. Burton J. Wyman
"Referee in Bankruptcy
"609 Grant Building
"San Francisco, California

"Dear Sir:

"Re: Garden City Canning Company,
No. 26284 L

"On June 3rd, 1936, I filed the following claims with the Clerk of the United States District Court in San Francisco, to-wit: W. M. Addy, in the sum of $934.57; of John Saunders in the sum of $1577.70; of J. B. Bowen, in the sum of $625.00; of R. J. Sutton, in the sum of $435.77 and J. J. Heidotting in the sum of $308.91.

"These claimants have not as yet received any sum whatsoever and I understand that payments have been made to other claimants.

"Will you kindly advise me why the claimants for whom I filed claims have not received the money due them?

"Very truly yours,

LEH/kj "LOYD E. HEWITT"

"EXHIBIT 'D'

"August 10, 1937

"Clerk of the United States District Court of the Northern District of California, San Francisco, California.

"Re: Garden City Canning Company, Debtor. [67]

"Dear Sir:

"On June 3rd, 1936, I mailed to you the claims of W. M. Addy in the sum of $934.47; of John Saunders in the sum of $1577.70; of J. B. Bowen, in the sum of $625.00; of R. J. Sutton, in the sum of $435.77 and J. J. Heidotting in the sum of $308.91, all claims being against the above named debtor, Garden City Canning Company, and on June 4th, 1936, you returned my letter with this notation:

" 'Dear Sir:

" 'This will acknowledge receipt of the five claims mentioned above in the matter of Garden City Canning Co., Debtor.'

" 'Yours very truly,

" 'W. B. MALING, Clerk,

" 'By C. M. TAYLOR,

" 'Deputy Clerk.'

"I believe Taylor is the name of the deputy that signed the notation.

"It is my understanding that the other creditors have received payments on their claims, but none of these creditors for whom I have filed claims with you have received any payment whatsoever.

"Will you kindly advise me why these claims have not been recognized?

"Very truly yours,

"LEH/kj "LOYD E. HEWITT"

"EXHIBIT 'E'

"August 13th, 1937

"Loyd E. Hewitt, Esq.,
"District Attorney,
"Yuba City,
"California.

"Dear Sir:

"Re Garden City Canning Co., Debtor, No. 27284-L

"In response to your letter of August 10th: The claims mentioned in your letter, to-wit: Addy, Saunders, Bowen, Sutton and Heidotting were received and filed in this office on June 4, 1936. [68]

"I am unable to state why these claimants have not received the payments provided for in the plan of reorganization unless it be that these claims were not brought to the attention

of the parties responsible for the distribution of the funds, since they were filed in this office rather than with the Special Master as directed in the notice.

"Yours very truly,

"WALTER B. MALING,
Clerk,
"By C. M. TAYLOR,
"Deputy Clerk."

(See original thereof on file in the office of the Clerk of this Court.)

The debtor's verified answer to the petition reads:

"Now comes Garden City Canning Company, a corporation, the debtor above named, and, in answer to the petition of John Saunders, W. M. Addy, J. B. Bowen, R. J. Sutton, and J. J. Heidothing, admits, denies and alleges as follows, to-wit:

"I.

"Answering Paragraph I of said petition, the debtor admits that on the 6th day of February, 1936, it filed with the clerk of the above entitled court its petition for reorganization, under section 77-b of the Bankruptcy Act, and that on the 8th day of February, 1936, the above entitled court made and entered its order approving the said petition; that thereafter and on the 3rd day of March, 1936, it filed with the above entitled court its verified sched-

ule of creditors and stockholders and that it set forth in said schedule, as creditors, the names and addresses of the petitioners hereinabove named; that thereafter and on the 12th day of March, 1936, the above entitled [69] court made its order permitting the debtor to remain in permanent possession of its assets, which said order further provided that any and all issues or matters arising in these proceedings of any nature whatsoever be referred to Honorable Burton J. Wyman, as Special Master of the above entitled court, for consideration and report, and which order further provided that all claims of creditors be filed on or before the 15th day of June, 1936; that thereafter the debtor filed with the above entitled court its schedule of assets and liabilities and in its schedule of liabilities listed the names and addresses of the petitioners herein and set forth the true and correct amounts due to said petitioners, and in this connection the debtor denies that the amount set down after the name of John Saunders was less than the amount due him from said debtor and alleges that said schedule correctly discloses the amount due to said John Saunders; the debtor further alleges that thereafter and pursuant to said order of March 12th, 1936, the debtor petitioned said Special Master for an order approving the form of the summary of the order

made and entered by the above entitled court on the 12th day of March, 1936, and an order was made by said Special Master approving the form of the summary of said order; that a copy of the summary of said order was published in the manner provided by said order of March 12th and copies were mailed to each and all of the creditors of said debtor, including the petitioners herein; that said summary of said order as approved by the Special Master recites: 'Said order further provides that in order to participate in the plan of [70] reorganization, creditors must file their claims in the form prescribed by the Acts of Congress relating to bankruptcy on or before the 15th day of June, 1936, said claims to be filed at the office of the Special Master, 1095 Market Street, San Francisco, California'; admits that thereafter and on or about the 20th day of April, 1936, the affidavit of publication of notice to creditors and stockholders was filed with the above entitled court and that thereafter and on the 1st day of May, 1936, the debtor filed with the above entitled court its plan of reorganization, setting forth amongst its creditors, the names of the petitioners herein, with the amounts due said petitioners; denies that the amount set down after the name of John Saunders was less than the amount actually due him but alleges that the amount set down

after the name of John Saunders was the amount actually due to said John Saunders; admits that thereafter and on the 30th day of July, 1936, there was filed with the above entitled court the acceptance of the plan of reorganization by the creditors, and in that connection alleges that none of the petitioners herein filed their acceptance to said plan of reorganization; admits that thereafter and on or about the 4th day of November, 1936, the debtor filed with the above entitled court its petition for confirmation of said plan of reorganization, in which petition the debtor set forth a list of all of its creditors who had filed claims with the Special Master in accordance with the notice theretofore given to creditors, together with the amount due to each of said creditors, and on or about said 4th day of November, 1936, the debtor, pursuant to the approval of said Special Master, mailed written notices to all of the creditors [71] listed in its schedules on file herein, including the petitioners herein, of the hearing of said petition for confirmation of the plan of reorganization and directing said creditors to appear, if they saw fit, at said hearing, and which notices specifically referred creditors to the petition for confirmation of said plan of reorganization, on file in the office of the Special Master, which said petition, as hereinabove alleged,

provided for the payment to the creditors named therein who had filed claims with the Special Master; that thereafter and pursuant to said notice, a meeting of the creditors of the debtor was held before the Special Master on the 16th day of November, 1936; that none of said petitioners were present at said meeting, nor did any of said petitioners enter any objections to said plan of reorganization or to the granting of the petition for the confirmation of said plan; admits that thereafter and on the 2nd day of December, 1936, said Special Master filed with the above entitled court his report recommending the confirmation of said plan, in which report the Special Master recited that the claims duly filed in these proceedings were those claims set forth by the debtor in its petition for confirmation of the plan of reorganization; that thereafter and on the 15th day of December, 1936, and in accordance with the rules of the above entitled court, the petition of the debtor for confirmation of its plan of reorganization and the report of said Special Master came on regularly for hearing before the above entitled court, and an order was made approving said plan of reorganization and confirming the report of the Special Master and adopting the report of the Special Master as the findings of the court; that none of the [72] petitioners herein appeared at said

hearing, nor in any way objected to the entry of the said order of December 15th, 1936, nor did they or any of them appeal therefrom.

"II.

"Answering Paragraph II of said petition, the debtor admits that each of the petitioners filed with the office of the clerk of the above entitled court, proofs of claim in the amounts set forth in said Paragraph II and in that connection, denies that petitioner John Saunders had an allowable claim against said debtor in the sum of $1,577.70, or in any sum in excess of $364.40, and the debtor further alleges that none of said claims were filed with the Special Master and that neither the debtor, nor any of its attorneys, had any knowledge of the fact that said claims were filed with the clerk of the above entitled court until the service upon the attorneys for said debtor of the petition of the petitioners herein objecting to the debtor's petition for a final discharge.

"III.

"Answering Paragraph III of said petition, the debtor admits that according to the notice to creditors referred to in Paragraph I of said petition and in Paragraph I of this answer, the petitioners, as creditors, had to and including the 15th day of June, 1936, within which to file their claims against said debtor, and in

this connection alleges that according to the terms of said notice to creditors, as approved by the court, said creditors were directed to file said claims at the office of the Special Master.

"IV.

"Answering Paragraph IV of said petition, the [73] debtor admits that all of the creditors who filed claims with the Special Master, in accordance with the notice given to creditors, have received the amount due them according to the plan of reorganization as confirmed by the above entitled court, save and except three (3) creditors who have not presented their notes for payment, to whom there is a balance due in the sum of $30.81, which said sum has been set apart for the benefit of said creditors, and the debtor admits that the petitioners herein have received nothing in payment of said claims and alleges that the reason no payment was made to said petitioners is that said petitioners failed to file their claims with the Special Master as provided in the notice given to all creditors including said petitioners, and in this connection the debtor alleges that none of the creditors who were scheduled by it and who did not file claims with the Special Master have received any payment on account of their claims.

"As a further, separate and distinct defense to said petition, the debtor alleges:

"I.

"That the claim of John Saunders was only allowable in the sum of $364.40 and, had the claim of John Saunders been filed with the Special Master in the sum of $1,577.70, the debtor would have been required to file objections to the allowance thereof and a hearing would have been had thereon in accordance with the provisions contained in the order of the above entitled court, dated March 12th, 1936.

"As a further, second, separate and distinct defense to said petition, the debtor alleges: [74]

"I.

"That at the time of the proposing of the plan of reorganization, it was without funds to pay to its creditors, the amount provided for in said plan, and that in order to pay its creditors pursuant to said plan of reorganization, it was necessary for the debtor to borrow sufficient funds; that pursuant to the report of the Special Master, dated December 2nd, 1936, reciting the creditors entitled to participate in said plan of reorganization, which list of creditors did not include the claims of the petitioners herein, the debtor borrowed from the Pacific Can Company on the 19th day of De-

cember, 1936, the sum of $10,000.00, being the sum which the debtor estimated was necessary to pay the claims of the creditors which had been filed with the Special Master and allowed in the above entitled proceedings and gave to said Pacific Can Company, as security for said indebtedness, a lien on its inventory of canned fruits and vegetables.

"II.

"That subsequent to the entry of the order confirming said plan of reorganization, said debtor has incurred an additional indebtedness to various creditors, including an indebtedness to the Pacific Can Company for cans purchased on open account, on which indebtedness there is still an unpaid balance of $4,052.02; that in addition to said unsecured indebtedness, the debtor is indebted to said Pacific Can Company on an indebtedness represented by notes secured by a pledge of its entire pack of canned goods in the sum of $93,395.00, which said indebtedness includes the liability of the debtor for the sum of $10,000.00, borrowed from said Pacific Can Company to [75] consummate the plan of reorganization as confirmed by the above entitled court.

"III.

"That the debtor has no assets, save and except its inventory of canned goods pledged to

the Pacific Can Company as aforesaid; that the debtor is unable to borrow any money to pay the claims of petitioners; that the debtor has not packed any canned goods since the summer of 1937 and is unable to operate during the year 1938 by reason of its inability to obtain any financing and is, at the present time, engaged solely in liquidating said inventory of canned goods for the benefit of said Pacific Can Company and the debtor is informed, and believes, that upon the liquidation of said inventory of canned goods, it will still be indebted to said Pacific Can Company; that the only persons on the payroll of debtor are one night watchman, one stenographer, and labellers; that G. J. Greco, the president of the debtor corporation, and a large stockholder thereof, who was in active charge of the management of said debtor, is no longer on the payroll of said debtor and is, at the present time, seeking employment.

"IV.

"That had the claims of the petitioners herein been filed with the Special Master within the time allowed by the order of the above entitled court, the debtor would have attempted to borrow sufficient funds to pay said claims and, had the debtor been unsuccessful in borrowing said money, it would have filed an amended plan of reorganization whereby all of its cred-

itors would have received a lesser percentage of their claims. [76]

"As a further, third, separate and distinct defense to said petition, the debtor alleges:

"I.

"That by reason of the facts alleged in the creditors' petition and in this answer, the said creditors are estopped by laches to object to the granting of the debtor's discharge.

"Wherefore, the debtor prays that the objections of said creditors to its final report and application for a discharge be overruled and that the Special Master herein make his report and findings recommending that the debtor be granted its final discharge as prayed for.

"GARDEN CITY CANNING
COMPANY
"By G. J. GRECO
"Its President.

"LOUIS ONEAL and
"TORREGANO & STARK
"By ERNEST J. TORREGANO
"Attorneys for Debtor".

[Verification omitted for sake of brevity.]

(See original thereof which is handed up herewith as a part of this certificate and report.)

Taken in their chronological order, the record herein further shows the following:

On April 30, 1936, pursuant to the orders of March 12, 1936, and March 30, 1936, the following notice to creditors and stockholders was served upon all the stockholders and creditors, among the latter being all the creditors objecting to the discharge of the herein debtor:

"To the Creditors and Stockholders of the Debtor above named: [77]

"You and each of you will please take notice, and you are hereby notified, that on the 12th day of March, 1936, after proceedings duly and regularly had, the above entitled court made and entered an order permitting the debtor above named to remain in possession of its assets until action has been taken upon its reorganization plan, permitting the debtor to administer its assets and conduct its business, subject to the order of the court, and referring all matters in connection with the reorganization of said debtor to Hon. Burton J. Wyman, 1095 Market Street, San Francisco, California, as Special Master of the above entitled court.

"Said order further provides that in order to participate in the plan of reorganization, creditors must file their claims in the form prescribed by the Acts of Congress relating to Bankruptcy, on or before the 15th day of June, 1936, said claims to be filed at the office of the Special Master, 1095 Market Street, San Francisco, California.

"Said order further provides that for the purpose of being heard on any question arising in these proceedings, the interests of any stockholder shall be evidenced by the presentation to the Special Master of the certificate representing the stock held by him, or by the presentation of the certificate of a bank, trust company, broker, or other depositary satisfactory to the Special Master, stating that the stock is held for safekeeping, or otherwise, for the person or persons named in the certificate.

"Dated this 10th day of April, 1936.

"LOUIS ONEAL, Esq.

"TORREGANO & STARK

"By ERNEST J. TORREGANO

"Attorneys for Debtor".

(See originals of said orders and the affidavit of mailing, all of which are on file in the office of the clerk of this court.) [78]

November 4th, 1936, the debtor petitioned for confirmation of the plan of reorganization. Attached to said last mentioned petition and made a part thereof is Exhibit "B" which contains the list of unsecured claims filed in this proceeding, in accordance with the directions in the aforesaid notice, in which list no claim of any of the objecting creditors appears. According to the affidavit of mailing filed herein on the 14th day of November, 1936, the following notice to creditors

of the hearing of the petition for the confirmation of the plan was mailed to each of the creditors, including those herein objecting to the discharge of this debtor:

"To the creditors and stockholders of Garden City Canning Company:

"Please take notice that the debtor above named has filed herein a petition for confirmation of the plan of reorganization heretofore filed herein, which said plan has been accepted by creditors holding more than two-thirds in amount of all of the claims filed herein, and that Honorable Burton J. Wyman, Referee in Bankruptcy, as Special Master of the above entitled court, to whom these proceedings have been referred, has called a meeting of creditors of said debtor to be held at his office, Room 609 Grant Building, 1095 Market Street, San Francisco, California, on the 16th day of November, 1936, at the hour of 2 o'clock P. M. of said day, at which time evidence will be introduced by the debtor in support of said petition for confirmation of plan of reorganization, and at which time you may appear if you see fit and produce any evidence or argument in opposition to the confirmation of said plan.

"For further particulars you are hereby referred to the petition for confirmation of said reorganization plan [79] on file in the office of the said Special Master.

"Dated November 4th, 1936.

"LOUIS ONEAL and
"TORREGANO & STARK
"By ERNEST J. TORREGANO
"Attorneys for Debtor."

(See original of said last mentioned petition, said last mentioned notice, and said last mentioned affidavit, all on file in the office of the clerk of this court.)

When said petition for the confirmation of the plan of reorganization came on for hearing before me on the 16th day of November, 1936, at the hour and place fixed therefor in said last mentioned notice, NO CREDITOR OF THE DEBTOR, as shown by my certificate and report filed herein on the 22nd day of December, 1936, and now on file in the office of the clerk, of this court, APPEARED AT SAID HEARING.

(At no time prior to, or at said last mentioned hearing, or at any time prior to the signing and the entry of the order approving the plan of reorganization, on the 15th day of December, 1936, was it called to my attention that the aforesaid claims of the creditors now objecting to the debtor's discharge were missing from the list of unsecured creditors who had filed claims herein, nor was it called to my attention during any of the last referred to times, that any of the claimants now objecting to the discharge of the herein debtor,

in spite of the specific direction of the aforesaid notice to file claims with me as special master, had been ignored and that said claims instead had been filed with the clerk of the court, and not in accordance with said last mentioned notice.)

When the hearing on the petition of the objecting creditors was held before me, I was attended upon by August B. Rothschild, Esq., appearing on behalf of Messrs. Torregano & Stark, attorneys for the debtor, and Loyd E. Hewitt, Esq., the attorney for the objecting creditors. The following proceedings then took place: [80]

"The Master: Will you give the appearances, gentlemen?

"Mr. Hewitt: My name is Loyd E. Hewitt. I am appearing for the petitioners in this action: John Saunders, W. M. Addy, J. B. Bowen, R. J. Sutton, and J. J. Heidothing.

"This matter, as Your Honor knows, has been referred to you on an order referring creditors' objection to report and final discharge of debtor to Burton J. Wyman, Special Master. The petition of the creditors objecting to the report and final discharge is on file and I ask for the introduction of all files and papers in the matter of the proceeding of the reorganization of the corporation in the matter of Garden City Canning Company, No. 27284-L.

"The Master: They are part of the records and will be considered.

"Mr. Rothschild: They are not in evidence, but considered part of the record?

"The Master: They are part of the record. They will be considered. There is no necessity to offer them into evidence because they are before the Court.

"Mr. Hewitt: The reason I made that offer is I am not familiar with the usual order.

"The Master: I hold that anything in the records of the Court is part of the record and can be considered by the Court, even though it is not in the same case, so long as they are related cases.

"Mr. Hewitt: Now, in this petition John Saunders, W. M. Addy, J. B. Bowen, R. J. Sutton, and J. J. Heidothing are objecting to the report and ask that it be not accepted or approved and the debtor be not discharged; that the above entitled Court make its order that before said debtor is finally discharged that it be caused to pay said petitioners, [81] and each of them, the amount due said petitioners according to their proven claim on the same percentage basis on which the other unsecured creditors of said debtor were paid, and for such other and further relief as to this Court may seem meet and equitable in the premises.

"Now insofar as the claims of petitioners except that of John Sutton, there is no question as to the amount. The only amount there is any

question about is the John Sutton claim and the claim there is that it is three hundred and some odd dollars. I think we claim something like $1400 or $1500. due.

"Mr. Rothschild: Correct.

"Mr. Hewitt: And Mr. Rothschild agreed with me and stipulated with me that it would not be necessary to bring Mr. Sutton in at this time until the matter was threshed out as to the standing of petitioners insofar as their claims were concerned. Now, insofar as the petition itself is concerned, has Your Honor read it?

"The Master: Yes.

"Mr. Hewitt: It shows that on or about the fourth day of June, I believe it is, 1936, the petitioners, all the petitioners filed their claims for the amounts as set forth in Paragraph 2 of the petition, which is found on page 3 thereof. These claims were filed with the Clerk of the United States District Court, in which this matter was then pending. The records will show the claims were filed on that date and for the amounts set after the different names of the different creditors or petitioners. Now, the creditors have received nothing. The answer to the petition admits all of the allegations of the petition except that it denies the amount which John Sutton sets out and claims there was due and owing him a lesser amount, [82] I believe in the sum of three hundred and some odd dol-

lars. As I said before, the claims are on file; I suppose it is only a question of law and a matter of argument insofar as we are concerned in this matter at this time.

"Mr. Rothschild: There is a little evidence I want to put in at this time.

"Mr. Hewitt: I see. Now, as long as these claims are considered as evidence, I think that is all that is necessary to present at this time until the evidence is put in by Mr. Rothschild, if that is agreeable to the Court.

"The Master: Very well.

"A. B. ROTHSCHILD,

"called for the debtor, sworn.

"The Witness: I am associated with the firm of Torregano & Stark, attorneys of record for the debtor in this proceeding. I was in charge, for that firm, of handling this particular proceeding. The first time that I learned that the claims of the petitioners were filed with the Clerk of the United States District Court was on being served with the petition of the petitioners objecting to the final discharge; I know of my own knowledge that no other member of our firm or of the firm of Louis Oneal, associated with us as attorney for the debtor, had any knowledge that the claims were on file. Cross examine?

(Testimony of A. B. Rothschild.)

"Cross Examination

"Mr. Hewitt: Q. Do you know whether or not any of the employees of the Garden City Canning Company knew the claims were on file and discussed those matters?

"A. Not to the best of my knowledge and Mr. Greco is here to testify. [83]

"Q. I speak particularly of Marie Hauck, a peach buyer and agent for the company. Do you know whether or not she discussed the matters either with Mr. Oneal, yourself, or any officers of the company?

"A. Whether they were discussed with any officers of the company, I do not know, nor can I speak for Mr. Oneal's office. I do know I never met Marie Hauck; to the best of my knowledge she never has been in our office. I think I would know if she had been in the office.

"Mr. Hewitt: That is all.

(Witness excused.)

"G. J. GRECO,

"Called for the Debtor. Sworn.

"The Master: Q. What is your full name?

"A. G. J. Greco.

"Mr. Rothschild: Q. Mr. Greco, when did you first learn that the claims of the petition-

(Testimony of G. J. Greco.)

ers in this proceeding were filed with the Clerk of the District Court?

"A. Well, it was right after I filed for the discharge. You sent me a wire telling me about finding these other claims.

"Q. Did you have any conversation with Marie Hauck with reference to the claims of these parties?

"A. No, I did not.

"Q. Do you know whether any other member of the organization did? A. No.

"Q. At the time you proposed the plan of reorganization in this proceeding, did you have the cash to make the payments provided for by the plan? A. No, we did not.

"Q. And where did you obtain that amount?

"A. We borrowed $10,000 from the Pacific Can Company.

"Q. Do you recall whether you effected the reorganization promptly upon the plan's being accepted by the creditors? [84]

"A. I believe it was promptly.

"Q. Well, wasn't there a delay of a few months?

"A. I take it back. I don't think we started paying the creditors until sometime in December and the proceedings were in the summer, June or July.

"Q. How did you arrive at that sum of $10,000 that you borrowed?

(Testimony of G. J. Greco.)

"A. Well, that represented approximately 50 per cent of the amount owed of those that filed.

"Q. Now, to refresh your recollection, the order confirming the reorganization was made in December of 1936. Has the debtor corporation, the Garden City Canning Company, incurred any indebtedness since that time?

"A. Yes, we have.

"Q. To whom? A. To whom?

"Q. Yes?

"A. Well, there are several tomato growers and supply houses.

"Q. Does the Garden City Canning Company owe money at this time?

"A. Yes, we do.

"Q. To whom do you owe money?

"A. To these particular tomato growers and supply houses and there is one big one in there for the rental on pear equipment.

"Q. Has the indebtedness to the Pacific Canning Company ever been paid back?

"A. You refer to this $10,000?

"Q. To this $10,000?

"A. Well you see, that $10,000, they took a lien on the inventory and that has been paid back as we shipped, along with the original amount borrowed on the inventory on warehoused goods.

(Testimony of G. J. Greco.)

"Q. Are you still indebted to the Pacific Canning Company?

"A. Yes, we are.

"Q. For approximately how much?

"A. Approximately $25,000. [85]

"Q. Is that all secured?

"A. All secured.

"Q. By what?

"A. Warehouse receipts on the inventory.

"Q. Is there any free inventory?

"A. No, none.

"Q. When was the last time the cannery was in operation?

"A. The summer of 1937.

"Q. Why have you not operated since then?

"A. Well, this year we were unable to effect any financing so we had to close it up.

"Q. Is there any business being done there at this time?

"A. Just selling the canned goods.

"Q. And do you think the canned goods have sufficient value to liquidate the indebtedness to the Pacific Canning Company?

"A. That all depends on the market. The way the market is now, they may just about break even, but I doubt it.

"Q. Do I understand there has been a rise in the market since March of this year?

"A. A rise?

(Testimony of G. J. Greco.)

"Q. Yes? A. It is going down.

"Q. Who is on the payroll of the Garden City Canning Company?

"A. The only one on the payroll is a girl who acts as bookkeeper and plant agent, and we are only paying her now $50 a month.

"Q. Who handles the sales?

"A. Well, I handle the sales through brokers in the city.

"Q. Are you on the payroll?

"A. No, I am not.

"Q. When is the last time you were on the payroll?

"A. The last time I was on the payroll was last January or February.

"Q. At the present time you are unemployed? A. Right.

"Q. Would it be possible at this time to obtain funds to pay the claims of the petitioners? A. Well I would say definitely no.

[86]

"Q. There are no present plans to reopen the cannery?

"A. No, there are not.

"Mr. Rothschild: Cross examine.

"Cross Examination

"Mr. Hewitt: Q. Mr. Greco, you were present when this matter was first heard in the United States District Court?

(Testimony of G. J. Greco.)

"A. Yes.

"Q. At that time Mr. Torregano appeared for you, did he not?

"A. Yes, sir.

"Q. At that time Mr. Torregano stipulated that—you saw me there then, did you not?

"A. Well, I believe I saw you there.

"Q. Mr. Whitmore and myself?

"A. Well, I would not swear to it. I saw a couple of gentlemen there; I imagine you were one of them.

"Q. And there was an objection made to Mr. Torregano and finally a stipulation made upon which an order of Court was based, that during the time this matter was being decided upon, whether or not the reorganization was going to be allowed, that the Greco Canning Company, of which your father was president, was not to receive any money under the order which it had for payment, and that the only moneys to be spent was for your own salary and those necessary to carry on the business of selling the canned goods, do the shipping, and take care of the business. Is that correct?

"A. Well, I would not say it is correct as to every detail, but I remember something to that effect.

"Q. And at that time you knew that Mr. Whitmore was appearing for Mr. Winship and

(Testimony of G. J. Greco.)

one or two others and I was appearing for these petitioners, did you not? A. Yes.

"Q. Did you ever go to the Clerk's office to see whether or not any claims were filed by these people against you? [87]

"A. Did I ever go?

"Q. Yes? A. No, I did not.

"Q. Did you ever write or instruct any one to write to these claimants concerning their claims? A. No.

"Q. Now, in your petition you set forth the names of these petitioners and state that they were creditors of the company; that the amounts of money claimed in their petition, except that of John Sutton, and as to that amount it was a reduction down to some three hundred odd dollars—— A. Yes.

"Q. And at that time of November 4th, rather November 16th, the time the reorganization was set for hearing before His Honor here, your petition then and plan of reorganization included the claims and the amounts that you thought at that time were due these different petitioners, which are the same amounts as we claim, except as to John Sutton?

"A. Other than those that were shown in here?

"Q. Yes, on the 16th of November, 1936?

"A. Well, as far as I remember, the claims

(Testimony of G. J. Greco.)

that were presented in this Court did not include those claims you are referring to.

"Q. In the plan of reorganization that was filed and was heard, I believe, on the 16th of November, 1936, wasn't it, Mr. Rothschild?

"Mr. Rothschild: It is stipulated it was heard.

"Mr. Hewitt: Q. There were named in that plan unsecured creditors and you set forth William Addy, J. B. Bowen, and J. J. Heidothing, R. J. Sutton, John Saunders, and other petitioners, did you not?

"A. I think in the original plan of reorganization they were included.

"Q. And in the plan of reorganization which was acceptable at that time, you intended to pay these creditors, did you not?

"A. At the original time, yes.

"Q. On the 16th of November, 1936? [88]

"Mr. Rothschild: I object to that as calling for the opinion of the witness as to the law applicable to the proceeding.

"Mr. Hewitt: His intention, Your Honor.

"(Question read.)

"Mr. Rothschild: The time referred to is the first of November.

"The Master: The plan of reorganization will speak for itself. Does it show anything about the claims?

(Testimony of G. J. Greco.)

"Mr. Hewitt: It shows these claims were in there, yes.

"The Master: That they had filed?

"Mr. Hewitt: The plan of reorganization shows those remaining unsecured claims against the debtor are, and sets them forth, with their names, Addy, Bowen, Sutton, et cetera.

"Mr. Rothschild: Mr. Hewitt, may I make this suggestion? Possibly it will be stipulated I can testify from here.

"Mr. Hewitt: It is perfectly all right.

"The Master: Wait a minute. Where are we on this question?

"Mr. Rothschild: Will you hold the ruling on the question because I think I may clear some facts in Mr. Hewitt's mind.

"The Master: Very well.

"Mr. Rothschild: On or about April 30, 1936, we mailed to all of the creditors listed in the bankruptcy schedules, with some few exceptions which did not include your clients, the mimeographed form of the plan of reorganization, which I have in my hand, together with a form of proof of debt. I call particular attention to the fact that the mimeographed form as I have it here has a form of consent attached to it as to the plan of reorganization. They were sent, as I recall, duplicates to each creditor. Those who accepted sent back the [89] copy, the form

(Testimony of G. J. Greco.)

of consent to that, which we filed with this Court. So the document you are referring to is the same document that was presented to the creditors at the end of April and filed with this Court, as I recall, in June.

"Mr. Hewitt: The same document on which this Court made its order on the 16th of November, 1936, isn't it?

"Mr. Rothschild: That is correct.

"Mr. Hewitt: And had in there that the unsecured claims set forth unsecured claims against the debtor are as follows, and it names the petitioners herein.

"Mr. Rothschild: That is correct. I suggest that these two documents to which I referred in the testimony be introduced in evidence.

"The Master: Very well. Now then the question that was asked, isn't it covered by the plan of reorganization?

"Mr. Rothschild: The papers on file speak for themselves, the plan and the order of Court and the Master's report.

"The Master: The objection will be sustained. This will be Debtor's Exhibit No. 1, of October 7, 1938.

"Mr. Hewitt: Q. When you borrowed the $10,000, from the Pacific Canning Company, you say?

"The Witness: A. Yes, sir.

(Testimony of G. J. Greco.)

"Q. When you borrowed the $10,000 from the Pacific Canning Company, that was to pay the unsecured claims mentioned in your plan of reorganization, was it not?

"A. That was to pay unsecured claims of those that had filed, that we had known about that filed in this Court.

"Q. The amount that you arrived at was on the basis of the unsecured claims that you had mentioned at the time of the reorganization, was it not?

"A. No. No, the amount borrowed was based on the number, on the amount of unsecured claims that were filed with this Court.

[90]

"Q. You never at any time had any knowledge of any claims being filed with the Clerk of the United States District Court?

"A. I certainly did not.

"Q. For the Northern Division of California? A. No, sir.

"Q. The Northern District of California. That is all.

"Redirect Examination

"Mr. Rothschild: Q. During the pendency of this proceeding you frequently were in touch with Mr. Oneal's office? A. Yes.

"Q. Where you gave information to them and they in turn advised you? A. Yes.

(Testimony of G. J. Greco.)

"Q. Did they ever show you a list of claims on file in this proceeding?

"A. Did they ever show me?

"Q. Yes?

"A. Yes, I have a list of names of those on file.

"Recross Examination

"Mr. Hewitt: Q. Does that list include the names of these petitioners?

"A. No, it did not.

"Q. They were given you by Mr. Oneal or members of his office?

"A. I believe they were.

"Q. Did they state those were all the claims filed in this proceeding?

"A. Those were absolutely the names of the petitioners that filed in this Court.

"Q. The names of the petitioners who filed in this Court? A. Yes.

"Q. These names were not there?

"A. No, they were not.

"Q. But the list——

"A. That is what I am talking about, the list.

"Q. I guess we misunderstood each other. Pardon me. The list given you by Mr. Oneal's office was given you with the [91] understanding that was a list of all creditors who had filed claims in this proceeding at that time?

(Testimony of G. J. Greco.)

"A. Yes.

"Q. That was given you after June 14, 1936, was it?

"A. Well, it must have been after June 14, 1936.

"Mr. Hewitt: I think that is all.

(Witness excused.)

"Mr. Hewitt: I will ask you a question, Mr. Rothschild: Mr. Rothschild, did you ever go to the Clerk's Office to see whether or not any claims were filed with the Clerk of this Court?

"Mr. Rothschild: Not until after I received your petition.

"Mr. Hewitt: Q. Did any member of Torregano & Stark's office examine the files to see whether any claims were filed with the Clerk of the United States District Court?

"A. No.

"Q. In this proceeding.

"Mr. Hewitt: That is all.

"Mr. Rothschild: Your Honor, as I see it, I don't think there is any real dispute as to the facts here. I think Mr. Hewitt will concede that none of the parties knew about the claims being on file until after their objections to the final discharge. The sole question, as I see it, is whether we should have known whether they were on file.

"Mr. Hewitt: If the Court please, may I at this time, merely for the purpose of the record, introduce a letter dated June 3, 1936, which will substantiate Exhibit A of the affidavit which went on file?

"Mr. Rothschild: I might suggest, Mr. Hewitt, I will stipulate that the exhibits to your affidavit are true exhibits, if the parties were here they would identify their letters as set forth.

"Mr. Hewitt: Thank you very much, Mr. Rothschild. [92]

"Mr. Rothschild: As I say, there is no dispute on the facts. The facts are these: We relied on the amount of claims on file; the money was borrowed accordingly and claimants were paid accordingly. Also, it is a fact there is no money at the present time. The plant is indebted to the Pacific Canning Company.

"Mr. Hewitt: Will you pardon me just one moment?

"Mr. Rothschild: Yes.

"Mr. Hewitt: Will you stipulate that the affidavit by me may be introduced in evidence and may be my testimony?

"Mr. Rothschild: Yes. I don't recall what it says.

"Mr. Hewitt: An affidavit supporting the petition.

"The Master: We will consider the whole record.

"Mr. Rothschild: Well, consider all affidavits as testimony.

"I don't know how familiar Your Honor is with the answer. My argument is merely a reading of it.

"The Master: I have checked through here and I don't see it. You filed it in the District Court, did you?

"Mr. Rothschild: I presume so.

"The Master: Maybe I have overlooked it here.

"Mr. Rothschild: Filed in March of 1938. It should be just before the order of reference.

"Mr. Hewitt: One of the last things filed.

"The Master: No, the order of reference was filed on February 14, 1938.

"Mr. Rothschild: The answer was filed with you, Your Honor. The order of reference provided that the answer be filed that way. I can briefly summarize it. That is my argument. The facts set forth there are, that the debtor after instituting the proceeding filed its schedules, wherein [93] the names of the particular creditors were set forth; that the District Judge made an order continuing the debtor in possession and referring the proceeding to Your Honor as Special Master, and provided for the filing of claims; that the debtor then prepared a form of notice to creditors, advising them as to claims to be filed at this office pursuant

to a petition of the debtor. Your Honor approved the form of notice to the creditors with reference to the filing of claims; according to affidavit filed here, notice was sent to all creditors scheduled. At that time the creditors were circularized with plan of reorganization.

"That no acceptances were filed by the particular creditors; that on or about the 4th of November, 1936, the debtor filed its petition for confirmation of the plan of reorganization and set forth and listed all of the creditors whose claims had been filed with the Special Master in accordance with the notice theretofore given creditors, together with the amounts due, and on or about said 4th day of November, 1936, the debtor, pursuant to the approval of said Special Master, mailed written notices to all of the creditors listed in its schedules, including the petitioners, of the hearing on the petition for the confirmation of the plan and directing the creditors to appear if they saw fit, at the hearing, and which notice specifically referred the creditors to the petition for the confirmation of the plan of reorganization on *filed* in the office of the Special Master, which said petition provided for the payment to the creditors named therein who had filed claims with the Special Master; that thereafter and pursuant to said notice, a meeting of the creditors of the debtor was held before the Special Master on the 16th day of November, [94]

1936; that none of said petitioners were present at said meeting, nor did any of said petitioners enter any objections to said plan of reorganization or to the granting of the petition for the confirmation of said plan; admits that thereafter and on the 2nd day of December, 1936, said Special Master filed with the above entitled Court his report recommending the confirmation of said plan, in which report the Special Master recited that the claims duly filed in these proceedings were those claims set forth by the debtor in its petition for confirmation of the plan of reorganization; that thereafter and on the 15th day of December, 1936, and in accordance with the rules of the above entitled Court, the petition of the debtor for confirmation of its plan of reorganization and the report of said Special Master came on regularly for hearing before the above entitled Court, and an order was made approving said plan of reorganization and confirming the report of the Special Master and adopting the report of the Special Master as the findings of the Court; that none of the petitioners herein appeared at said hearing nor in any way objected to the entry of the said order of December 15th, 1936, nor did they or any of them appeal therefrom.

"The remaining allegations of our answer are concerned with the claim of Sutton. It will be necessary to hear the objections to that claim. If it is to be allowed, there is a jurisdic-

tional matter. That there was no knowledge on any one's part that these claims had been filed.

"There is a special defense setting up the present financial condition of the debtor corporation, that money was borrowed to pay the claims of creditors on file and other arrangements would have had to be made had the debtor known of these particular claims. Our personal position on the matter is that it is very unfortunate. I don't know of any case where similar claims have [95] been filed with the District Court. Prior to this I have never examined the files of the Clerk's Office to determine whether any claims were filed there where the notice specifies they should be filed with this Court. It is a peculiar matter. Unless we were duty bound to examine those records, it is just an unfortunate situation where with this lapse of time and the present condition of the company, nothing can be done about it. That is the practical point. Then the legal situation is: The final order was made by the District Court in December of 1936, confirming Your Honor's report as Special Master, and Your Honor's report specifically provided for payment to the creditors referred to in Your Honor's report, being creditors whose claims had been filed with you. That, as I say, became the order of the District Court and, in my opinion, was an appealable order at that time because

due notice was given of all these proceedings to the creditors in question.

"Mr. Hewitt: If the Court please, insofar as filing the claims with the Clerk of the United States District Court under Section 77B of the Bankruptcy Act, it is my understanding, when I take the provisions of that Bankruptcy Act and all the General Orders and apply them in this particular instance as to claims, in the United States Code annotated, 511, Chapter VI, Section 93, Subdivision (c):

" 'Claims after being proved may, for the purpose of allowance, be filed by the claimants in the Court where the proceedings are pending or before the Referee, if the case has been referred'.

"Subdivision (d) reads:

" 'Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the Court, unless objection to their allowance shall be made by parties in interest, or [96] their consideration be continued for cause by the Court upon its own motion.'.

"General Order XX:

" 'Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the Judge, may be filed either with the Referee or with the Clerk.'.

"As to Subdivision (c) of Section 93, in the case of P. Derby & Co., decided, I believe, in

1937, found in 18 Fed. Sup. at page 995, it was held:

"'It is not necessary that proof of claim against a bankrupt shall have been filed with the Referee, it being sufficient if the claim is filed with the trustee or the Clerk of the Bankruptcy Court.'

"The Master: Of course, those are all straight bankruptcy proceedings.

"Mr. Hewitt: That is true, Your Honor, but as I understand Section 77B, under which the reorganization of this corporation was undertaken, it is a matter in which the Bankruptcy Statute and General Orders apply, whether it is on reorganization or what not.

"The Master: Well, not necessarily. They may and they may not. They have held, for instance, with reference to filing of claims under Section 74, that the general law of bankruptcy does not apply at all.

"Mr. Hewitt: I don't know of any proceeding where it has been held under Section 77B that the general law, that as long as you have them in Court, they are perfectly all right.

"The Master: The order made a special finding after that.

"Mr. Hewitt: But in this particular case, which was found in 18 Fed. Sup. at page 995, the corporation first filed for reorganization under Section 77B; the claims under Section 77B were filed with the trustee as provided for

in General Order XX, [97] since they were filed with the Referee or the Clerk of the Referee. The petition for reorganization was not allowed and the corporation then filed directly in bankruptcy and asked to be adjudicated a bankrupt. The matters were before the Court and were records of the Court and this employee of the trustee, who was appointed in the bankruptcy matter, knew of these claims. The trustee never knew of it and a considerable period of time elapsed, in fact a year had passed, as I remember it on reading the case, and it was held there that inasmuch as the matters had been filed with the Court, regardless of whether they were filed prior to the petition of bankruptcy, under the General Bankruptcy Order, even though filed under Section 77B, that still applied and they were still claims filed in the Court and could be and should be allowed insofar as the debtor was concerned.

"Also, in the case of In Re Brill, found in 52 Fed. (2d) 636, it was held that proof of claim against a bankrupt estate may be filed either in the office of the Clerk of the Bankruptcy Court or with the Referee. Of course, Your Honor, that merely goes to substantiate the case I just mentioned and it is a straight bankruptcy. I have been unable to find where the rules do not apply insofar as Section 77B is concerned.

"Then in the case of J. B. Orcutt Company, 204 U. S., page 96, it was stated:

" 'The presentation and filing having been made within the time and with one of the proper officers', that was speaking of filing with the trustee in that particular instance, 'and his failure to deliver it to the Referee cannot be held to be failure on the part of the creditor to properly file his proof'. And in that particular case the claims of the Scott Company were allowed and I believe some year after having been filed [98] with the trustee, the trustee gave them to his attorney and asked his attorney to file them with the Referee. The attorney took them to his office and asked one of the employees in his office to file them with the Referee and immediately forgot them. There was nothing done and some two years later one of the claims could not be found. This one was found in some other file. The claim was allowed and held entitled to be paid.

"We take the position that we have come into this Court, filed our claim within the time prescribed by law, we got the records into the Court itself, whether it be with the Special Master or not. The record was with the Clerk of the Court. Under the Bankruptcy Act, the debtor in this case, through its attorneys or other employees, was put on constructive notice that claims were filed, could be filed with the Clerk of the United States District Court. That

having been done, it was their duty to examine the files of the Clerk to see whether or not there had been any claims filed therein. Had they done so, they would have found the claims of these petitioners and, finding the claims of these petitioners, the petitioners would have been paid as were other creditors of the company whose claims were filed with the Special Master.

"Now, in addition to that, we had no way of knowing that these claims had not been found. True, we received notice that this matter or that matter was to come up. These men were farmers. They cannot afford to pay counsel to travel back and forth and examine papers which may be filed with the District Court. They relied upon the fact that they had filed claims and received no objections to the claims nor had they received any notice that the claims had been rejected and, having properly filed these claims with the Court, they took the position, this being a court of equity, they would receive the same amount of money as any other creditor, in proportion [99] to any other creditor, and we feel we are entitled under these cases and under General Order XX to have it determined that we were here and that we filed within the time and at the proper place.

"Now, if there is any question in Your Honor's mind as to whether or not these Orders and the General Bankruptcy Statute applies to Sec-

tion 77B, if Your Honor desires I will again try to make a search and allow other counsel more familiar with federal practice than I am to make the search and see whether or not we can find anything on it, in order to aid Your Honor in making your decision.

"Mr. Rothschild: If Your Honor please, had the debtor known about the filing of the claims, they would have been paid. Had the debtor known about the filing of these claims, it is very likely he would have been compelled to file an amended plan of reorganization. In the period that elapsed between the time the plan was filed and the time the plan was confirmed, in that same time he was raising the money. But that is neither here nor there. So far as the applicability of the General Orders to proceedings under Section 77B, let me read this one statement from Collier, at page 1539, 4th Edition, referring to filing claims in Section 77B proceedings:

" 'The Judge is required to prescribe the manner and time within which claims are to be filed, evidenced, and allowed. The ordinary provisions of the Bankruptcy Act are not applicable in determining when a creditor must file his claim. Subdivision (c) (6) gives the 77B Court the power to determine when claims must be filed. A creditor who fails to file during the required period will be barred unless

there is a provision in the plan providing for such late claimants'. [100]

"Mr. Hewitt: That says the time, doesn't it?

"Mr. Rothschild; No, the first is, 'time and manner'. Now the manner having been prescribed, particularly by the order approved by the Court that I first mentioned, all these proceedings having become final, in other words, the claims as filed pursuant to the notice are reported to the Court. The order made by this Master referred to the claims set forth in our petition.

"The Master: Certificate, rather than order.

"Mr. Rothschild: I think it was called an order. I guess it was a certificate. Then the petition for the confirmation again referring to that and the order of the District Court again referring to it. We have the situation where we start in with this first notice approved by the Court, cumulative, going up for each order and the creditors having notice of all orders, each order referring back to this original order.

"So far as the duty to check the Clerk's Office is concerned, it might not be so difficult here, but if that rule is applied here the same rule would apply to 77B proceedings referred to the Referee in Eureka as Special Master, or any place in the state. Is the attorney handling the case in Eureka in duty bound to go to Sacramento to check? So far as the rule in bankruptcy is concerned, claims may be filed

either place; the section so states. And there the clerks are required to deliver claims filed with them in ordinary bankruptcy proceedings to the Referee, and that is necessary because under General Order XXIV the Referee shall maintain open to inspection a list of claims proved against an estate, so if it were definitely a bankruptcy, definitely we would have a right to rely on the Referee's records over some other officers of the government. I don't think it applied in this case. [101] There is no statutory duty, in my opinion, under Section 77B, but if there were such a duty, I don't think the debtor should be penalized by the Clerk's failing to perform his duty. If it were a regular bankruptcy proceeding, the debtor would have a right to rely on General Order XXIV, stating that the Referee shall keep records. The Referee has a right to rely on General Order LI, stating that the Clerk will forward claims to him. Even if the general rule applied, we would have a situation whereby the debtor could not be penalized.

"The Master: I will give you ten days, counsel, to submit any further authorities and you may take five days thereafter to answer, Mr. Rothschild.

"(Submitted 10 and 5)."

(See Reporter's Transcript handed up herewith as a part of this Certificate and Report.)

DISCUSSION BY AND OPINION OF SPECIAL MASTER

This is a perfect example of a case wherein unfortunate results, i.e., the loss of pro rata payments of claims of certain creditors, are brought about because of the failure of such creditors, or their representative, or representatives, to follow the specific direction of the notice to creditors to file their claims with the special master instead of with the court. In an attempted justification of the filing of said claims directly with the court instead of with the special master, in spite of the unambiguous language of the notice with regard to the time and place of filing, counsel for said creditors cites three cases, In re P. Derby Co., 18 F. Supp. 995, In re Brill, 52 F. (2d) 636, and J. B. Orcutt Co., v. Green, 204 U. S. 96, 27 S. Ct. 195, 51 L. Ed. 390. Counsel for said creditors also calls attention to General Order XX. A reading of the decisions relied upon to excuse said creditors from their negligence in this regard, clearly shows that said decisions [102] deal with regular bankruptcy proceedings and not with situations arising in proceedings under section 77B of the Bankruptcy Act, as does the proceeding here under discussion.

In ordinary proceedings in bankruptcy whether the claims of creditors be filed in the courts where the proceedings are pending, or before the referees in charge of said proceedings, such filings are

equally effective, *but only so because provision is made for such alternative filings both in the act proper and in General Orders.** Section 57(c) of the Bankruptcy Act provides, "Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred." General Order XX states, "Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk." Neither of these rules can give any comfort to the creditors who failed to comply with the notice giving directions when and where claims of creditors should be filed, for the reason that the herein proceeding is not a regular proceeding in bankruptcy, but one strictly under the peculiar provisions of Section 77B of the Bankruptcy Act and being one in which a referee was not, and legally could not, be appointed, at any stage of these proceedings to date. These rules therefore have no operative force herein, particularly in the light of certain provisions of Section 77B. In this connection, see subdivision (c) (6) which, in part reads, "Upon approving the petition or answer or at any time thereafter, the judge, in addition to the jurisdiction and powers elsewhere in this section conferred upon him, * * * shall determine a reason-

*Italics in this Opinion are Special Master's.

able time within which the claims and interests of creditors and stockholders may be filed or evidenced and * * * *the manner in which such claims and interests may be filed or evidenced and allowed,* * * *"* Also, note the reading of subdivision (k), the portion pertinent to a consideration of the matter [103] now before the court being as follows, "If an order is entered directing the trustee or trustees to liquidate the estate pursuant to the provisions of clause (8) of subdivision (c) of this section: (1) The case may be referred to a referee * * * (4) claims which are provable under section 63 may be proved as provided in section 57 * * * *None of the sections enumerated in this subdivision (k), except subdivisions (g), (i), (j), and (m) of section 57, * * * shall apply to proceedings instituted under this section 77B unless and until an order has been entered directing the trustee or trustees to liquidate the estate."*

See, also, Foust v. Munson S. S. Lines, 299 U. S. 77, 82, 57 S. Ct., 90, 93, 81 L. Ed. 49, 53.

Inasmuch as no order of liquidation has been entered herein, and inasmuch as under the situation here presented, the provisions of subdivision (c) of section 57 of the Bankruptcy Act are expressly eliminated by the language above quoted from section 77B, subdivision (k) (4), of said Act, it conclusively follows that counsel's argument with reference to the applicability of General Order XX, promulgated long before section 77B was enacted, which General Order is almost identical with said

subdivision (c) of section 57 of the Act, must fall.

While it is to be regretted that these claimants have been deprived of their pro rata payments, there seems to be no remedy under the facts, circumstances and law with which the court has to deal herein, the chief reason being that there is no fund on hand with which to pay these claimants, assuming these claims all to be correct in form and substance. Secondly, the court is brought face to face with a clear case of laches on the part of these claimants, whose negligence began when they disregarded the express wording of the notice which told them when and where their claims should be filed, and whose negligence continued when they failed to be present, or represented, at the hearing held on November 16, 1936, i. e., the hearing on the petition [104] for confirmation of the plan of reorganization, at which time said creditors would have learned of their failure to file their claims as said notice directed, and I, as special master, later could have so prepared my certificate and report on said petition for confirmation as to protect the rights of said negligent creditors.

Under the evidence herein, the debtor being without any funds over which the court could exercise jurisdiction, there would be but two ways in which the court could make provision for the pro rata payment of these negligent creditors, (1) compel the debtor, which heretofore has acted strictly in accordance with the orders of this court, itself di-

rectly to raise the money with which to make said payments, or (2) compel said debtor to proceed against those creditors of the same class as the negligent creditors to repay into debtor's estate, sufficient money to take care of these unpaid pro rata payments in each instance. Legally and equitably either of these methods would be violative of the doctrine of laches, of which it was said by the Supreme Court of the United States in Galliher v. Cadwell, 145 U. S., 368, 373, 12 S. Ct. 873, 875, 36 L. Ed. 738, 740, "* * * laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced —an inequity founded upon some change in the condition or relations of property or the parties." See, also, Pickens v. Merriam (C.C.A. 9) 242 F. 363, 371, to the same effect. "A suitor in equity", declared the court in Speidell v. Henrici, 15 F. 753, 756, "is required to be 'prompt, eager, and ready' in the pursuit of his rights. Diligence is an essential condition of equitable relief, and unexplained negligence is never encouraged." In the language of the Supreme Court of the United States in affirming the decree dismissing the bill in equity in the last cited case, Speidel v. Henrici, 120 U. S. 377, 387, 7 S. Ct. 610, 612, 30 L. Ed. 718, 720, declared, "Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights, and shows no excuse for [105] his laches in asserting them. 'A court of

equity,' said Lord Camden, 'has always refused its aid to stale demands, where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court.' ''

The negligence, or laches, of the creditors objecting to the entering of a decree of final discharge of the debtor can not be excused because of any purported negligence of the clerk of this court in connection with the claims of said creditors, "The clerk of a court is essentially a ministerial officer. 7 Cycl. Law & Pro. 196. And he has nothing to do with the character or purpose of papers which are tendered to him to be filed." United States v. Bell, 127 F. 1002, 1003. The duties of the clerk of any court, and particularly those of the clerk of this court, are many and exacting, among such duties, however, is none which imposes upon him the task of examining the papers of each proceeding on file in his office to see whether, in the filing of papers, interested persons, be they litigants, claimants or counsel, have complied with a specific law, or a definite instruction. The fact that counsel for these objecting creditors said in his letter dated June 3,

1936, "Will you please file the same* and see that they are referred to the proper referee," does not make any showing of negligence on the part of the clerk of this court *for the reason that no referee, as such, ever has been named in this proceeding and there is no duty resting upon the clerk to refer any papers to a special master, other than those which he is directed so to do by a specific order of the court under which he acts as clerk.*

It is worthy of note that nowhere in the record does it appear that counsel now representing the objecting creditors ever made any request [106] that he, as such counsel, be given special notice of any of the proceedings had, or taken herein. *His name does not appear as being the attorney in fact, or in law, on any of the claims filed with the court.* (See originals thereof in the folder containing the papers hereinbefore filed in the office of the clerk of this court.) In the claims of *J. J. Heidotting,* (designated in the petition of objection and in the affidavit supporting said petition as J. J. Heidothing) and R. J. Sutton, *Chas. A. Wetmore, Jr.* (no address given) is named attorney in fact; in the claims of John Saunders, W. M. Addy, and J. B. Bowen, no one is named in the letters of attorney.

Under all the facts and circumstances herein present, particularly in the light of the laches of said objecting creditors, it would appear, *and I so find and conclude,* that the prayer of said creditors'

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*the claims in question.

petition should be denied, and that the report of the debtor of complete execution and accomplishment of confirmed plan of reorganization and petition for discharge should be passed upon by the court as if said petition of said objecting creditors never had been filed herein.

RECOMMENDATION OF SPECIAL MASTER

I therefore respectfully recommend that the court make its order in conformity with the foregoing finding and conclusion.

SPECIAL MASTER'S FEES AND EXPENSES

I am of the opinion that the sum of $50.00 is a reasonable sum to be allowed me as my compensation for conducting the aforesaid hearing and the preparation of the within certificate and report, and the further sum of $15.00 to cover my office and clerical expenses in connection therewith.

I also am of the opinion that the sum of $29.65, made up of the items, $6.25 per diem and $20.70 for transcribing stenographic notes, is a reasonable sum to be allowed Mrs. Carolyn R. Blair for her [107] services as stenographic reporter herein.

I respectfully suggest that in any order which is made in connection with this certificate and report provision be made for incorporating in said order the allowances of the requested amounts, or such other amounts as to the court shall seem proper under the circumstances prevailing.

PAPERS HANDED UP HEREWITH

I hand up herewith the following papers:

1. Envelope containing evidence; and
2. Transcript of Testimony.

Dated: June 12th, 1939.

Respectfully submitted,

BURTON J. WYMAN,

Special Master

[Endorsed]: Filed Jun. 12, 1939. [108]

EXHIBIT "R"

[Title of District Court and Cause.]

SUPPLEMENTARY CERTIFICATE AND REPORT OF SPECIAL MASTER ON OBJECTION TO REPORT AND FINAL DISCHARGE OF DEBTOR

To Honorable Harold Louderback, United States District Judge for the Northern District of California:

I, Burton J. Wyman, one of the referees in bankruptcy of this court, acting as special master herein, hereby certify and report:

That through inadvertence the Brief of Claimants Supporting the Contention that their Claims were Properly Filed, Debtor's Points and Authorities in Reply to Opposition to Discharge, and Reply Brief of Claimants' to Debtors Points and Authori-

ties, were omitted from the papers handed up with my Certificate and Report of Special Master on Objection to Report and Final Discharge of Debtor. I therefore hand them up herewith as a part of the said last mentioned certificate and report.

Dated: June 13th, 1939.

Respectfully submitted,
BURTON J. WYMAN,
Special Master.

[Endorsed]: Filed Jun. 13, 1939. [109]

EXHIBIT "S"

Re: Garden City Canning Company

OPINION

St. Sure, District Judge:

The question is whether in a reorganization proceeding under 77B of the Bankruptcy Act of 1934, creditors named in debtor's schedules and in the proposed plan of reorganization, who thereafter file claims with the Clerk instead of with the Special Master, as ordered by him, and whose claims are not paid, may be heard to object to the report of debtor of complete execution of confirmed plan and petition for final discharge.

The facts are undisputed. Debtor filed its petition for reorganization on February 6, 1936, which

was approved by the court. Debtor filed its verified schedule of stockholders and creditors, among the latter being W. M. Addy, J. B. Bowen, J. J. Heidotting, R. J. Sutton, and John Saunders, petitioners herein. On March 14, 1936, an order was made permitting debtor to remain in permanent possession and referring the entire matter to Burton J. Wyman, Referee in Bankruptcy, as special master for hearing and report. On April 10, 1936, debtor filed its verified schedule of assets and liabilities, and among the unsecured claims appear the following:

W. M. Addy	$934.58
J. B. Bowen	633.29
J. J. Heidotting	308.91
R. J. Sutton	435.77
John Saunders	364.40

On May 1, 1936, the plan of reorganization was filed, containing, inter alia, a list of general unsecured claims, among which again appear the names and amounts above stated. In the plan debtor proposed to pay to all of its general unsecured creditors 50 percent. of the amount of their [110] claims in installments. On June 4, 1936, petitioners filed with the Clerk their claims as follows:

W. M. Addy	$ 934.57
J. B. Bowen	625.00
J. J. Heidotting	308.91
R. J. Sutton	435.77
John Saunders	1,577.70

On November 4, 1936, debtor filed its petition for confirmation of plan, attached to which is a copy of the proposed plan, again listing the names of petitioners as creditors. Also attached to the petition is a "List of Unsecured Claims on File" in which petitioners' names do not appear. On December 2, 1936, the special master filed his report, recommending confirmation of the plan, which report did not, however, provide for the payment of petitioners' claims. The plan was approved by the court on December 15, 1936. On January 12, 1938, debtor filed its report of complete execution of the confirmed plan and petition for final discharge. On January 22, 1938, petitioners filed objections to the report and petition for final discharge, which were referred to the special master for hearing and report. The matter is now before the court on objections to the special master's report overruling petitioners' objections and recommending that the discharge be granted.

The special master adopted the view that petitioners were guilty of laches in that "they disregarded the express wording of the (his) notice which told them when and where their claims should be filed", which was on or before June 15, 1936, at the office of the special master, 1095 Market Street, San Francisco. As we have seen, petitioners, through their attorney, filed their claims on June 4, 1936, with the Clerk of the United States District Court. The Clerk acknowledged receipt of these claims,

and the docket shows they were filed on June 4, 1936. [111]

When amendments to the National Bankruptcy Act providing for corporate reorganization were passed by the Congress in 1934, much confusion resulted in the minds of the bench and bar as to the application of the new procedure of the provisions of the National Bankruptcy Act and the General Orders in Bankruptcy promulgated by the United States Supreme Court. It is now settled that a reorganization is not in bankruptcy until liquidation is ordered. In 1934 General Order XX read: "Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk." In 1935 General Order LXII was added, which states: "The following additional rules shall apply to proceedings under section 77B of the Bankruptcy Act," specifying a series of additional rules. In June, 1936, the United States Supreme Court amended the General Orders (298 U. S. 695) to state that certain of the General Orders should not apply to 77B proceedings, namely, XVII, XVIII, XXI, XXVIII and XXIX. No exclusion is made of Order XX. Under the circumstances it was quite natural for petitioners to assume that the proper place to file their claims was with the Clerk of this court.

There is a feature of the case which strongly appeals to me, and that is that the entire pro-

cedure leading up to the confirmation of the plan of reorganization shows actual knowledge on the part of the debtor of the claims of petitioners. Their names are given not only in the schedules, but also in the proposed plan itself. The claims are listed by the debtor, and undisputed save as to one of them. The plan of reorganization makes no provision for payment upon presentation [112] and acceptance of claims, but contains an unqualified offer to pay 50 percent. of the amount of the claims listed. Under the law as amended in 1938 there is no question that petitioners would share in the distribution. Sec. 224(4) of the Bankruptcy Act as amended in 1938. For debtor to seek to gain an advantage through petitioners' filing their claims with the Clerk instead of the special master, there being some justification for such action because of the uncertainty of the law at the time, is, under the admitted facts here, repugnant to equity.

The report and finding of the special master will be disapproved and rejected.

Dated: September 13, 1939.

[Endorsed]: Filed Sep. 13, 1939. [113]

EXHIBIT "T"

ORDER

Ordered:

1. That the "Certificate and Report of Special Master on Objection to Report and Final Discharge of Debtor" is disapproved and rejected.

2. That as there appears to be some question as to the accuracy of the claim of John Saunders, the debtor may have ten days from date hereof in which to file written objections to the allowance of said claim, which shall be heard upon notice.

3. That Burton J. Wyman as special master be and he is hereby allowed the sum of $50 for his services as special master; the sum of $15 to cover his office and clerical expenses; and $29.65 for the services of his stenographic reporter; all to be taxed as costs herein.

4. That debtor's petition for a final decree and discharge now before the court be, and it is hereby denied, without prejudice, however, to the filing of another petition by said debtor for final decree and discharge if and when said debtor shall have satisfied the claims of the objecting creditors, and each of them.

Opinion filed.

Dated: September 13, 1939.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Filed Sep. 13, 1939. [114]

EXHIBIT "U"

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM ORDER OF SEPTEMBER THIRTEENTH DENYING DEBTOR'S PETITION FOR A DISCHARGE.

To the Above Entitled Court and to the Clerk thereof and to William Addy, J. B. Bowen, J. T. Heidotting, R. J. Sutton and John Saunders and to whom it may concern:

Notice is hereby given that Garden City Canning Company, a corporation, the debtor above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the order entered in this proceeding by the above entitled court on or about and not before September 13th, 1939 disapproving and rejecting the report of Burton J. Wyman, as Special Master, and denying the application of Garden City Canning Company, said [115] debtor to a discharge, which order provided that said petition for a discharge could be renewed only after payment of the claims of William Addy, J. B. Bowen, J. T. Heidotting, R. J. Sutton and John Saunders and which order fixed the Special Master's compensation and directed that the same be taxed as costs.

The amount involved in this appeal and the value of the property affected by said order of the Dis-

trict Court involves more than Five Hundred Dollars ($500.00).

Dated: October 11th, 1939.

LOUIS ONEAL and
TORREGANO & STARK
By ERNEST J. TORREGANO
Attorneys for Garden City
Canning Company, Debtor.

Address of Attorneys for William Addy, J. B. Bowen, J. T. Heidotting, R. J. Sutton and John Saunders:

Messrs. Brobeck, Phleger & Harrison
and Moses Lasky, Esq.
Crocker Building
San Francisco, Calif.
Loyd E. Hewit, Esq.
Yuba City, California.

(Admission of service)

[Endorsed]: Filed Oct. 11, 1939. [116]

EXHIBIT "V"

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know all men by these presents: That we, Garden City Canning Company, a corporation, as principal, and the American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, and authorized to transact business in the State of California, as

Surety, are held and firmly bound unto William Addy, J. B. Bowen, J. T. Heidotting, R. J. Sutton and John Saunders, in the full and just sum of Two Hundred Fifty & 00/100 Dollars ($250.00), to be paid to the said William Addy, J. B. Bowen, J. T. Heidotting, R. J. Sutton and John Saunders, their heirs, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 11th day of October, 1939.

Whereas, the Garden City Canning Company, a corporation, Debtor in the above-entitled action is about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from an order entered in this proceeding by the above-entitled Court on or about and not before September 13th, 1939, disapproving and rejecting the report of Burton J. Wyman, as Special Master, and denying the application of Garden City Canning Company, a corporation, said debtor, to a discharge.

Now, the Condition of the above obligation is such, that if the said Garden City Canning Company, a corporation, shall prosecute the said appeal to effect, and answer all charges and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

This recognizance shall be deemed and construed to contain the "Express Agreement" for summary

judgment and execution thereon, mentioned in Rule 34 of the said United States District Court.

GARDEN CITY CANNING
COMPANY
By G. J. HTRVO
AMERICAN SURETY COMPANY
OF NEW YORK
By: W. J. CONKLIN
Res. Vice-President.

Attest:
[Seal] B. DUCRAY
Res. Asst. Secretary.

Bond #445603-K.

Premium $10.00 per annum. [118]

State of California,
City and County of San Francisco

On this 11th day of October in the year one thousand nine hundred and thirty-nine before me, Thomas A. Dougherty, a Notary Public in and for said City and County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared W. J. Conklin and B. Ducray known to me to be the Resident Vice-President and Resident Assistant Secretary respectively of the American Surety Company of New York the corporation described in and that executed the within and foregoing instrument, and known to me to be the persons who executed the said instrument on behalf of the said corporation, and they both duly acknowl-

edged to me that such corporation executed the same. In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office, in the said City and County of San Francisco, the day and year in this certificate first above written.

[Seal] THOMAS A. DOUGHERTY

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires August 10, 1943.

[Endorsed]: Filed Oct. 11, 1939. [117]

EXHIBIT "W"

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME FOR DOCKETING RECORD IN APPELLATE COURT

It Is Hereby Stipulated by and between the appellant, Garden City Canning Company, and the appellees, William Addy, J. B. Bowen, J. T. Heidotting, B. J. Sutton and John Saunders, that the appellant may have to and including the 5th day of December, 1939, within which to docket the record on appeal herein with the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: November 17th, 1939.

LOUIS ONEAL
TORREGANO & STARK
By ERNEST J. TORREGANO
Attorneys for Appellant.

LOYD HEWITT
A. M. DREYER
BROBECK, PHLEGER & HARRISON
By A. M. DREYER
Attorneys for Appellees.

It Is So Ordered.

Dated: November 18, 1939.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Filed Nov. 18, 1939. [119]

EXHIBIT "X"

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME FOR DOCKETING RECORD IN APPELLATE COURT

It Is Hereby Stipulated by and between the appellant, Garden City Canning Company, and the appellees, William Addy, J. B. Bowen, J. T. Heidotting, B. J. Sutton and John Saunders, that the appellant may have to and including the 20th day of

December, 1939, within which to docket the record on appeal herein with the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: December 1st, 1939.

LOUIS ONEAL
TORREGANO & STARK
By ERNEST J. TORREGANO
Attorneys for Appellant
LOYD HEWITT
A. M. DREYER
BROBECK, PHLEGER & HARRISON
By A. M. DREYER
Attorneys for Appellees.

It Is So Ordered.

Dated: December 5, 1939.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Dec. 5, 1939. [120]

EXHIBIT "Y"

[Title of District Court and Cause.]

DESIGNATION OF POINTS TO BE RELIED UPON ON APPEAL

1. There is no evidence to support the order of the District Court denying appellant's petition for discharge.

2. The order confirming the plan of reorganization being a final order of the District Court and having been made on notice to appellees they are bound by the terms thereof.

3. Appellees are estopped from objecting to the appellant's application for a discharge because although they received notice requiring them to file their claims with the [121] Special Master in the above entitled proceedings they disregarded said notice and unknown to appellant and its attorneys they filed their said claims in the office of the Clerk of the District Court.

4. Appellees did not follow the law and the general orders of the Supreme Court in filing their said claims in the reorganization proceedings and appellant, believing that said claims had not been filed, borrowed sufficient money to pay the claims of creditors that had been filed as reported in the petition to confirm the plan of reorganization, which plan was confirmed after notice to the appellees; that appellant at the present time has no assets.

5. Appellees are estopped from objecting to the final discharge of appellant as their failure to properly file their claims was due to their own negligence and by reason of said negligence appellant has in good faith paid the remaining creditors, who filed their claims in accordance with the notice approved by the court, the sum due them, and appellant, in order to obtain the money required to be paid under said plan of reorganization as confirmed, divested itself of all of its assets.

6. Appellees are estopped from objecting to the discharge of appellant in that appellees had notice of the hearing of the petition for confirmation of the plan of reorganization and had they appeared at that time the District Court would have had the power to make provision for the payment to said appellees or required the appellant to file an amended plan of reorganization, but, on the contrary, appellees, by their failure to appear, permitted the District Court to grant appellant's petition for confirmation of the plan of reorganization, which petition made no provision for payment to appellees.

7. The issues raised by appellees before the District Court are res adjudicata by reason of the final order [122] of the District Court approving the plan of reorganization.

8. The District Judge abused his power in denying appellant a discharge for the reason that the report of the Special Master, after due hearing, recommending appellant's petition for discharge, was supported by uncontroverted evidence and was not erroneous.

LOUIS ONEAL,
TORREGANO & STARK,
By ERNEST J. TORREGANO
Attorneys for Appellant. [123]

[Endorsed]: No. 9400. United States Circuit Court of Appeals for the Ninth Circuit. Garden City Canning Company, Appellant, vs. William Addy, J. B. Bowen, J. T. Heidotting, R. J. Sutton and John Saunders, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed, December 20, 1939.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 9400.

GARDEN CITY CANNING COMPANY,

Appellant,

vs.

WILLIAM ADDY, J. B. BOWEN, J. T. HEIDOTTING, R. J. SUTTON and JOHN SAUNDERS,

Appellees.

DESIGNATION OF RECORD AND STATEMENT OF POINTS UNDER RULE 19

The appellant hereby requests that the entire "Agreed Statement of a Case for use on Appeal",

as approved by the Judge of the District Court, be printed.

The appellant hereby designates as the points on which it intends to rely on appeal all of the points designated in the designation of points attached to the said agreed statement as Exhibit "Y", and made a part of said agreed statement.

Dated: December 29, 1939.

LOUIS ONEAL,
TORREGANO & STARK,
By ERNEST J. TORREGANO,
Attorneys for Appellant. [125]

Receipt of a copy of the within Designation of Record and Statement of Points Under Rule 19 is hereby admitted this 29 day of December, 1939.

LOYD HEWITT
A. M. DREYER
MOSES LASKY
BROBECK, PHLEGER & HARRISON
By M. LASKY
Attorneys for Appellees.

[Endorsed]: Filed Dec. 29, 1939. Paul P. O'Brien, Clerk. [126]

No. 9400

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GARDEN CITY CANNING COMPANY,
Appellant,

vs.

WILLIAM ADDY, J. B. BOWEN, J. T. HEIDOTTING, R. J. SUTTON and JOHN SAUNDERS,
Appellees.

APPELLANT'S OPENING BRIEF.

LOUIS ONEAL,
First National Bank Building, San Jose, California,
TORREGANO & STARK,
Mills Building, San Francisco, California,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 9400

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GARDEN CITY CANNING COMPANY,
Appellant,

vs.

WILLIAM ADDY, J. B. BOWEN, J. T. HEIDOTTING, R. J. SUTTON and JOHN SAUNDERS,
Appellees.

APPELLANT'S OPENING BRIEF.

BASIS OF COURT'S JURISDICTION.

The jurisdiction of the District Court was invoked by the filing of a debtor's petition on February 6th, 1936 under the provisions of section 77B[1] of the Act of Congress relating to bankruptcy.

11 U.S.C., section 207[1]. (Tr. page 1.)

This petition was approved as properly filed. (Tr. page 2.)

The jurisdiction of this Court is invoked under section 24[2] of the Act of Congress relating to bankruptcy, by appeal from an order denying the debtor a final discharge.

11 U.S.C., section 47[2].

[1]Refers to sections of Bankruptcy Act and U.S.C. prior to amendments of June 22nd, 1938.

[2]Refers to sections of Bankruptcy Act and U.S.C. subsequent to amendments of June 22nd, 1938.

STATEMENT OF THE CASE.

This is an appeal from an order of the District Court (Tr. page 152), made in the course of proceedings under section 77B of the Bankruptcy Act, rejecting a Special Master's report (Tr. pages 79 ff.) and denying the application of the debtor for a final decree closing the proceedings and granting the debtor a final discharge. (Tr. page 76.) Objections to said application were filed by appellees (Tr. page 76) on the ground that appellees had not been paid under the plan of reorganization.

It is conceded that appellees were not paid. Appellant contends that under the facts hereinafter set forth appellees could not object to the discharge on this or any other ground.

The proceedings in the District Court were instituted on February 6th, 1936 when Garden City Canning Co., hereinafter referred to as the debtor, filed its petition for reorganization under section 77B of the Bankruptcy Act. On the same day an order was made approving the petition. (Tr. pages 1 and 2.)

The debtor thereafter filed its verified list of creditors and stockholders (Tr. pages 8 ff.) and notice was given them of the hearing, at which time the Court might make permanent its order of February 6th, 1936 or appoint a trustee or trustees or make such other order as might be necessary in the proceedings. (Tr. page 2.)

On March 12th, 1936, the continued date of this hearing, the District Court made its order permitting the debtor to remain in permanent possession of its

assets, and referring the proceedings to Honorable Burton J. Wyman, a Referee in Bankruptcy of said Court, as Special Master. (Tr. page 13.) This meeting was attended by counsel for the appellees. (Tr. page 117.)

The order of March 12th, 1936 (Tr. pages 13 ff.) provided in part as follows:

> "That the debtor herein shall file * * * its plan of reorganization which plan shall set forth in detail in what manner if at all, the rights, liens and equities of creditors and stockholders will be affected by said plan *if it be confirmed.*" (Tr. page 16.)
>
> "That any and *all* issues or *matters arising in these proceedings* * * * be and they are hereby referred for consideration and report to Honorable Burton J. Wyman * * * and *upon the conclusion of said hearing* before said Special Master, he is hereby directed and instructed to report to this court with all convenient speed, the testimony taken before him, his findings of fact, conclusions of law and recommendations. * * *" (Tr. pages 16-17.)
>
> "That the claims and interest of creditors and stockholders shall be filed or evidenced and allowed in the following manner: All claims of creditors shall be filed in the manner herein provided, on or before the 15th day of June, 1936, and unless so filed on or before said date, no such claim may participate in any plan of reorganization, except upon an order first had and obtained from the court on good cause shown; that upon the filing of claims of creditors and stockholders, in the manner required by law, in relation to the proving of claims in debtor's pro-

> ceedings under Section 77B of the Bankruptcy Act, each of them shall be deemed finally allowed in these proceedings unless the debtor * * * shall object to the allowance of any such claims by filing an objection with the Special Master. * * *" (Tr. page 18.)
>
> "That the debtor shall, on or before the 2nd day of April, 1936, give notice of the making and entry of this order to all the creditors * * * by mailing a copy of this order or a brief summary thereof in form satisfactory and approved by the Special Master to such creditors * * * and by causing the publication of said brief summary * * *." (Tr. page 22.)

On April 10th, 1936 a summary of said order (Tr. page 104) was mailed to creditors. (Tr. page 3.) This summary, or notice, contained the following provision:

> "Said order further provides that in order to participate in the plan of reorganization, creditors must file their claims in the form prescribed by the Acts of Congress relating to Bankruptcy on or before the 15th day of June, 1936, *said claims to be filed in the office of the Special Master, 1095 Market Street, San Francisco, California.*" (Tr. page 104.)

Pursuant to the order of March 12th, 1936, this notice was approved by the Special Master before being published and mailed to the creditors including appellees. (Tr. page 33.)

On April 30th, 1936 the debtor filed its proposed plan of reorganization (Tr. pages 34 ff.) wherein it agreed to pay its creditors fifty per cent (50%) of

the amount of their claims. The plan, as filed, contained the following provision:

> "This plan of reorganization is to become effective when consents by or on behalf of creditors holding more than two-thirds (⅔) in amount of claims against debtor whose claims are provable and allowable and who would be affected by the plan of reorganization are filed *in the office of Honorable Burton J. Wyman, Special Master* of the above entitled court, 1095 Market Street, San Francisco, California, *and an order is made by the above entitled court approving this plan of reorganization.*" (Tr. page 42.)

A mimeographed copy of the plan of reorganization together with a form of consent (Tr. page 43) and form of proof of claim (Tr. page 44) were mailed to all of the creditors listed in the debtor's schedules, including appellees. (Tr. page 120.)

Thereafter, thirty-five (35) creditors filed claims, totalling Nineteen Thousand Two Hundred Eighty-eight and 32/100 Dollars ($19,288.32), with the Special Master. (Tr. page 68.)

On June 4th, 1936, and within the time fixed for filing claims (June 15th, 1936), appellees, through Loyd E. Hewitt, their attorney, filed their claims in the office of the clerk of the United States District Court. (Tr. pages 48 to 60.) These claims were for the amounts set forth after appellees' names in the debtor's schedules (Tr. pages 44 ff.), and in the plan, save that in the case of appellee John Saunders, the debtor listed the claim at Three Hundred Sixty-four and 40/100 Dollars ($364.40), whereas said appellee

filed his claim for Fifteen Hundred Seventy-seven and 70/100 Dollars ($1,577.70). (Tr. page 57.) Neither the debtor nor its attorneys had any knowledge that these claims were filed with the clerk of the District Court until approximately January 22nd, 1938, thirteen months after the confirmation of the plan. (Tr. pages 111, 113.)

On November 4th, 1936 the debtor filed its petition for confirmation of its plan of reorganization. (Tr. page 61.) This petition contained the following recital:

> "That annexed hereto and made a part hereof and marked Exhibit 'B' is a list of all proofs of claim which have been filed herein within the time within which claims can be filed." (Tr. page 63.)

Neither the names of appellees nor those of fourteen (14) other creditors of the debtor, who did not file claims, were included in said Exhibit "B".

Upon the filing of said petition for confirmation of the plan the Special Master called a meeting of creditors (Tr. page 66) and approved the form of notice of the hearing of the petition for confirmation (Tr. page 106), which notice was mailed to all of the creditors of the debtor, including the appellees. (Tr. page 5.) This notice specifically advised creditors that at said meeting they could appear and produce any evidence or argument in opposition to the confirmation of the plan. No creditors appeared at this meeting. (Tr. pages 69, 107.)

Thereafter, the Special Master filed his report recommending confirmation of the plan of reorganization. (Tr. page 67.)

The Master's report contains the following recitals:

"That pursuant to notice given by said debtor to its creditors thirty-five (35) creditors of said debtor filed and propounded herein their claims, which said claims amount to the sum of Nineteen Thousand Two Hundred Eighty-eight and 32/100 Dollars ($19,288.32); a list of said claims [this list was Exhibit 'B' to the petition for confirmation which did not include the names of appellees] is attached to the petition for confirmation of reorganization plan forwarded with this report." (Tr. page 68.)

"That only two (2) creditors failed to file consents to said plan of reorganization; namely, Press Smith with a claim of Eleven Hundred Sixty-three Dollars ($1,163.00) and W. P. Fuller & Co. with a claim of Seventeen and 19/100 Dollars ($17.19)." (Tr. page 69.) [Neither the five (5) appellees nor the other fourteen (14) creditors who did not file claims filed consents to the plan of reorganization.]

"That by said order of March 2nd [12th] all creditors of the debtor were directed to file proofs of claim *with said Special Master* on or before the 15th day of June, 1936, *notice whereof was duly given by the debtor to all creditors* by mail and published as and by said order provided." (Tr. page 70.)

On December 15th, 1936 the District Court (Honorable Harold Louderback) entered its order approv-

ing the plan of reorganization (Tr. page 74), which order contained the following recital:

> "IT IS HEREBY ORDERED that the report of Honorable Burton J. Wyman, Referee in Bankruptcy and Special Master, be and the same is hereby fully approved and confirmed to stand as the findings of this court." (Tr. page 74.)

No creditors appeared at the time set for the hearing of the petition for confirmation. (Tr. page 74.)

At the time the debtor proposed its plan of reorganization it did not have the funds with which to make the payments provided for by the plan but subsequently borrowed Ten Thousand Dollars ($10,000.) from the Pacific Can Company for this purpose (Tr. page 113) and gave the Pacific Can Company a lien on its pack of canned goods. (Tr. page 114.)

The debtor subsequently paid all creditors who had filed claims with the Special Master fifty per cent (50%) of their claims as provided for by the plan of reorganization and filed its petition for a final discharge. (Tr. page 76.)

On January 22nd, 1938 appellees filed a petition objecting to the debtor's petition for a discharge on the ground that although all other creditors had been paid the claims of appellees had not been paid. (Tr. page 79.) When service of this petition was made on counsel for appellant, appellant and its attorneys learned for the first time that appellees' claims had been filed with the Clerk of the District Court. (Tr. pages 111-113.)

At the time appellees' petition was filed objecting to the debtor's application for a discharge, the debtor had not been operating its cannery since the summer of 1937, had incurred obligations to new creditors and, in addition, was indebted to the Pacific Can Company in the sum of Twenty-five Thousand Dollars ($25,000.), secured by warehouse receipts on the debtor's entire inventory, the value of which inventory just about equalled the indebtedness to the Pacific Can Company. (Tr. pages 113, 114.)

The questions therefore presented are whether appellees were bound by the order of the District Court dated December 15th, 1936, made after notice to them confirming the debtor's plan of reorganization so that they could not thereafter contend by way of objections to the debtor's petition for a final discharge that they were entitled to payment under the plan of reorganization as the same was confirmed by the Court; and, further, whether appellees were barred by their laches and by reason of the debtor having changed its position based on appellees' conduct from objecting to the debtor's petition for a final discharge.

SPECIFICATIONS OF ERRORS RELIED UPON.

Appellant relies upon each and all of the specifications set forth in the Designation of Points to be Relied Upon on Appeal set forth in the Transcript of Record. (Tr. pages 159 ff.)

ARGUMENT.

I.

THE ORDER CONFIRMING THE PLAN OF REORGANIZATION BEING A FINAL ORDER OF THE DISTRICT COURT AND HAVING BEEN MADE ON NOTICE TO APPELLEES THEY ARE BOUND BY THE TERMS THEREOF.

(Point No. 2, Tr. page 160.)

THE ISSUES RAISED BY APPELLEES BEFORE THE DISTRICT COURT ARE RES ADJUDICATA BY REASON OF THE FINAL ORDER OF THE DISTRICT COURT APPROVING THE PLAN OF REORGANIZATION.

(Point No. 7, Tr. page 161.)

The Order of the District Court made by Judge Louderback on the 15th day of December, 1936, confirming the plan of reorganization, adopted the report of the Special Master to whom "all issues and matters arising in these proceedings" (Tr. page 16) were referred, as the findings of the Court. (Tr. page 74.)

The District Court therefore found:

1. That only thirty-five (35) creditors filed claims, these being the creditors set forth in Exhibit B to the debtor's petition for confirmation of its plan of reorganization and did not include the claim of appellees;

2. That only two named creditors failed to consent to the plan of reorganization (if appellees were to be counted there would have been seven non-consenting creditors exclusive of the fourteen other creditors who did not file claims); and

3. *That all creditors were directed to file their claims with the Special Master.*

When this order of the District Court became final appellees lost their right to contend that they were entitled to share in the payments to be made under the plan of reorganization. This order was a reviewable order under the provisions of section 24B of the Bankruptcy Act (11 U.S.C. 47B) as said section then read.

In re Botany Consolidated Mills, 89 Fed. (2d) 223;

Downtown Inv. Association v. Boston Metropolitan Building, 81 Fed. (2d) 314;

Texas Hotel Securities Corp. v. Waco Development Co., 87 Fed. (2d) 395.

Appellees have urged below that the Special Master was without authority to designate his office as the place where the claims of creditors were to be filed in that the order of the District Court dated March 12th, 1936 (Tr. pages 13 ff.) fixed the time within which claims had to be filed but was silent as to the place where said claims had to be filed.

There are two answers to this contention, both of which are conclusive: The Special Master had authority under the order of reference to require claims to be filed in his office. No appeal was taken from the order which confirmed the plan of reorganization and directed that distribution be made to the creditors who had filed claims with the Special Master.

The Special Master had authority to direct that creditors' claims be filed in his office for the following reasons:

1. *All issues and matters arising in the proceedings* were referred to the Special Master for hearing, consideration and report. (Tr. pages 16, 17.) The Master, accordingly, exercised the power to fix the place for the filing of claims, which power was vested in the District Judge by section 77B(6) of the Bankruptcy Act. This was one of the "matters" arising in the proceeding which was referred to the Special Master and which he later reported to the Court pursuant to the direction contained in the order of reference.

Equity Rule 62, which was in force at the time of this reference, dealing with the powers of a Master, provided in part as follows:

> "The Master shall * * * have full authority * * * generally to *do all other acts,* and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties."

Equity Rule 62 was applicable to references to Special Masters in bankruptcy proceedings.

In re Automatic Musical Co., 204 Fed. 334.

The Supreme Court of the United States in *Story v. Livingston,* 38 U. S. 359, 367, discussing the power of a Master to take testimony even though the order of reference did not specifically empower him to do so, stated:

> "* * * the order need not particularly empower * * * [the Master] to take testimony, if the subject matter is only to be ascertained by evidence."

2. The order of the District Court of March 12th, 1936 required the Master to pass on any objections that might be propounded to claims filed against the debtor. (Tr. pages 18, 19.) This necessarily required the claims to be before the Special Master.

3. The order of the District Court dated March 12th, 1936 directed that the debtor forward a summary of said order to its creditors in a form satisfactory to the Master. (Tr. page 22.) A notice (Tr. page 104) formally approved by the Master was forwarded to all creditors, including the appellees, which notice contained a summary of the order of March 12th and which notice further directed creditors to file their claims in the office of the Special Master.

4. When the District Court confirmed the Special Master's report on December 15th, 1936 and adopted the report as the findings of the District Court it approved the Master's exercise of the power to direct that claims be filed in his office.

Appellees received the notice so approved by the Master directing that claims be filed in the office of the Special Master on or before June 15th, 1936. This was the only notice relative to the filing of claims that appellees did receive.

Their counsel admittedly knew of the date specified in this notice before which claims had to be filed. (Tr. page 88.) If appellees neglected to inform him of the place where their claims were to be filed, the debtor's lack of knowledge that the claims were filed with the District Court instead of with the Special Master was due to appellees' negligence in advising

their counsel and not to the debtor's negligence. If the clerk of the District Court was under a duty to transmit the claims to the Special Master (and appellant agrees with the Special Master [Tr. page 143] that the clerk was under no such duty), his failure to so transmit the claims must be chargeable to the appellees who delivered their claims to the clerk and not to the debtor who had notified appellees to file their claims with the Master.

Appellees have also urged below—and this appears to be the basis of the decision of the District Court —that as the debtor's schedules list appellees as creditors and as the plan itself provided for payment to appellees (to Appellee Saunders in an amount different from that which he alleged to be due him in his claim), appellees were entitled to receive payment upon confirmation of the plan.

This argument overlooks the following points:

1. There were fourteen (14) creditors in addition to appellees who, for reasons best known to them, failed to file claims. There was, therefore, no reason for the debtor to suspect that appellees had filed claims in a place other than that designated by the Special Master. Many creditors in bankruptcy and reorganization proceedings do not file claims in order not to submit themselves to the summary jurisdiction of the Bankruptcy Court.

2. Under section 77B of the Bankruptcy Act as distinguished from Chapter X [section 224(2)], distribution could only be made to creditors whose claims were proved and allowed.

Bankruptcy Act, section 77Bc(6).

3. It is not the plan as proposed that governs payment but the plan as confirmed by the Court.

> "Upon final confirmation of the plan the debtor * * * shall put into effect and carry out the plan and *the order of the Judge relative thereto, under and subject to the supervision and control of the court.*"
>
> *Bankruptcy Act,* section 77Bh.

The answers to any contentions that appellees might make revert to the fact that the order of the District Court made by Judge Louderback on December 15th, 1936 was conclusive—in the absence of an appeal therefrom—that distribution was to be made to the thirty-five (35) creditors specified in the Special Master's report adopted by the District Court.

> "Upon such confirmation the provisions of the plan and of the order of confirmation shall be binding upon (1) the debtor, (2) all stockholders thereof, including those who have not, as well as those who have, accepted it, and (3) all creditors, secured or unsecured, whether or not affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it."
>
> *Bankruptcy Act,* section 77Bg.

To summarize this argument: debtors were not entitled to be paid under the order confirming the plan of reorganization from which no appeal was taken. The order confirming the plan is binding on all creditors. On the debtor's petition for a final discharge, the question is whether the plan as confirmed has been carried out by the debtor.

"Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, if any, making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Such final decree shall discharge the debtor from its debts and liabilities, and shall terminate and end all rights and interests of its stockholders, except as provided in the plan or as may be reserved as aforesaid."

Bankruptcy Act, section 77Bh;

In re Munson S. S. Lines, 80 Fed. (2d) 859, 860;

In re Paramount Publix Corp., 82 Fed. (2d) 230;

10 *Remington on Bankruptcy,* sections 4629, 4630.

Section 228 of Chapter X of the Bankruptcy Act as amended in 1938, which section was merely intended to clarify but not to change section 77Bh, states that upon the *consummation* of the plan, the Judge shall enter a final decree.

Weinstein's Comparative Analysis of Bankruptcy Law of 1938, p. 241.

There can be no question but that the plan as confirmed by the order of the District Court made by Judge Louderback, which order set forth that only thirty-five named creditors had proved claims, has been fully consummated. When Judge St. Sure subsequently entered the order of the District Court denying the debtor's application for a final discharge on the ground that the appellees should have been paid by the debtor he, in effect, reversed the order of that Court made by Judge Louderback almost two years

previously, from which order no appeal had been taken.

It is well settled that an order in a case within the jurisdiction of the Judge making it cannot be held void or disregarded by another Judge in the same Court before whom the case later comes.

> "His orders are the law of this court and they can only be set aside by a court authorized to reverse its decree."
>
> *In re Thomas,* 35 Fed. 337, 339.

To the same effect see:

Wakelee v. Davis, 44 Fed. 532;

Taylor v. Decatur Mineral & Land Co., 112 Fed. 449.

II.

APPELLEES ARE ESTOPPED FROM OBJECTING TO THE APPELLANT'S APPLICATION FOR A DISCHARGE BECAUSE ALTHOUGH THEY RECEIVED NOTICE REQUIRING THEM TO FILE THEIR CLAIMS WITH THE SPECIAL MASTER IN THE ABOVE ENTITLED PROCEEDINGS THEY DISREGARDED SAID NOTICE AND UNKNOWN TO APPELLANT AND ITS ATTORNEYS THEY FILED THEIR SAID CLAIMS IN THE OFFICE OF THE CLERK OF THE DISTRICT COURT.

(Point No. 3, Tr. page 160.)

APPELLEES DID NOT FOLLOW THE LAW AND THE GENERAL ORDERS OF THE SUPREME COURT IN FILING THEIR SAID CLAIMS IN THE REORGANIZATION PROCEEDINGS AND APPELLANT, BELIEVING THAT SAID CLAIMS HAD NOT BEEN FILED, BORROWED SUFFICIENT MONEY TO PAY THE CLAIMS OF CREDITORS THAT HAD BEEN FILED AS REPORTED IN THE PETITION TO CONFIRM THE PLAN OF REORGANIZATION, WHICH PLAN WAS CONFIRMED AFTER NOTICE TO THE APPELLEES; THAT APPELLANT AT THE PRESENT TIME HAS NO ASSETS.

(Point No. 4, Tr. page 160.)

APPELLEES ARE ESTOPPED FROM OBJECTING TO THE FINAL DISCHARGE OF APPELLANT AS THEIR FAILURE TO PROPERLY FILE THEIR CLAIMS WAS DUE TO THEIR OWN NEGLIGENCE AND BY REASON OF SAID NEGLIGENCE APPELLANT HAS IN GOOD FAITH PAID THE REMAINING CREDITORS, WHO FILED THEIR CLAIMS IN ACCORDANCE WITH THE NOTICE APPROVED BY THE COURT, THE SUM DUE THEM, AND APPELLANT, IN ORDER TO OBTAIN THE MONEY REQUIRED TO BE PAID UNDER SAID PLAN OF REORGANIZATION AS CONFIRMED, DIVESTED ITSELF OF ALL OF ITS ASSETS.

(Point No. 5, page 160.)

APPELLEES ARE ESTOPPED FROM OBJECTING TO THE DISCHARGE OF APPELLANT IN THAT APPELLEES HAD NOTICE OF THE HEARING OF THE PETITION FOR CONFIRMATION OF THE PLAN OF REORGANIZATION AND HAD THEY APPEARED AT THAT TIME THE DISTRICT COURT WOULD HAVE HAD THE POWER TO MAKE PROVISION FOR THE PAYMENT TO SAID APPELLEES OR REQUIRED THE APPELLANT TO FILE AN AMENDED PLAN OF REORGANIZATION, BUT, ON THE CONTRARY, APPELLEES, BY THEIR FAILURE TO APPEAR, PERMITTED THE DISTRICT COURT TO GRANT APPELLANT'S PETITION FOR CONFIRMATION OF THE PLAN OF REORGANIZATION, WHICH PETITION MADE NO PROVISION FOR PAYMENT TO APPELLEES.

(Point No. 6, Tr. page 161.)

By reason of appellees' laches and the debtor's change of position resulting from appellees' conduct, appellees were not in a position to object to the debtor's petition for a final discharge.

When counsel for the appellees forwarded the appellees' claims to the clerk of the District Court he knew that he might not be complying with the order with reference to the filing of claims for he wrote the clerk:

> "Will you please file the same and see that they are referred to the *proper Referee.* The last day of filing is June 15th, 1936. * * * If these are not in proper form will you return them to me by return mail at my expense, stating in what portion they should be amended or corrected." (Tr. page 88.)

In the absence of an order of liquidation, and no such order was ever made in this matter, there could be no Referee in Bankruptcy in a proceeding under

section 77B. Therefore, the clerk could not refer the claims to a Referee.

The claim of appellee Saunders was filed in the sum of Fifteen Hundred Seventy-seven and 70/100 Dollars ($1,577.70), whereas the debtor, in its schedules, only conceded an indebtedness due Saunders in the sum of Three Hundred Sixty-four and 40/100 Dollars ($364.40). The debtor, having no knowledge that the claims were filed with the clerk of the Court, was unable to file objections to the allowance of said claim in the increased amount.

The notice of the hearing of the petition for confirmation of the plan of reorganization received by the appellees specifically referred them to the petition for confirmation. (Tr. page 106.) Had they examined this petition they would have known that no payments were to be made to them upon the entry of the order confirming the plan.

Appellees failed to appear at the hearing of this petition for confirmation of the plan. Had they appeared they could have been granted relief. [Bankruptcy Act, section 77Bc(6).] At that time leave to participate in the plan was given to a creditor, Yuba Gardens, who had not previously filed a claim with the Special Master. (Tr. page 71.)

Appellees failed to appear before the District Judge at the time set for the hearing of the Special Master's report recommending confirmation of the plan. (Tr. page 74.)

Although appellees knew from the plan itself, copies of which had been received by them, that the first payment, due under the plan, was due immediately upon confirmation thereof, and that at that time they were to receive the notes for the deferred payments, they took no steps to apprise the debtor that they claimed a right to share in distribution under the plan, until January 22nd, 1938, more than thirteen months after the confirmation of the plan.

Until January 22nd, 1938 neither the debtor nor its attorneys knew that appellees had disregarded the notice directed to them to file their claims with the Special Master, and that they had filed their claims with the clerk of the District Court.

The proposed plan, itself, copies of which were forwarded to appellees with a form of proof of claim, disclosed that the debtor proposed to borrow the money needed to make distribution. In December of 1936 the debtor borrowed the sum of Ten Thousand Dollars ($10,000.), approximately fifty per cent (50%) of the proved claims, from the Pacific Can Company so as to enable it to make the payments under the plan. The amount of the loan was based on the total claims of creditors who had filed claims with the Special Master. (Tr. pages 113, 114, 122.) The debtor has pledged its entire assets to the Pacific Can Company to secure this loan of Ten Thousand Dollars ($10,000.) and an additional indebtedness subsequently incurred (Tr. page 115) and the debtor is now indebted to additional unsecured creditors, including tomato growers and supply houses, which it

is unable to pay. (Tr. page 114.) The debtor now has no assets whatsoever to apply to the payment of appellees' claims.

Had the debtor known that appellees had filed their claims it would either have attempted to borrow additional money, or would have filed an amended plan, paying a lesser amount to its creditors.

The Circuit Court of Appeals for the Second Circuit had occasion to pass upon a similar situation.

In re Diana Shoe Corporation, 80 Fed. (2d) 92.

In that case the plan of reorganization was confirmed on April 16th. Appellant took no steps to have its claim allowed until after the plan had been confirmed when, on April 19th, it filed a motion that leave be given it to file a proof of claim *nunc pro tunc.* The Court called attention to the binding effect of the order confirming the plan and pointed out that if the appellant were to share in the proceeds, the amounts payable to other creditors would be reduced and that to give the other creditors less would be to put into effect a different plan to which they had never consented. The Court stated:

> "Assuming that cause was shown for lifting the bar order and allowing the tardy claim to be filed had the motion been made before confirmation of the plan on April 16, the motion of April 26th came too late."

The failure of the appellees in the instant case to receive distribution under the plan was due solely to their having disregarded the notice received by them

from the Special Master, and their having failed to file their claims with the Special Master.

The argument as to why the appellees' objections to the debtor's application for a discharge should have been overruled is well stated in the Special Master's report (Tr. page 141), from which we quote as follows:

> "Under the evidence herein, the debtor being without any funds over which the court could exercise jurisdiction, there would be but two ways in which the court could make provision for the pro rata payment of these negligent creditors, (1) compel the debtor, *which heretofore has acted strictly in accordance with the orders of this court,* itself directly to raise the money with which to make said payments, or (2) compel said debtor to proceed against those creditors of the same class as the negligent creditors to repay into debtor's estate, sufficient money to take care of these unpaid pro rata payments in each instance. Legally and equitably either of these methods would be violative of the doctrine of laches, of which it was said by the Supreme Court of the United States in *Galliher v. Cadwell,* 145 U. S. 368, 373, 12 S. Ct. 873, 875, 36 L. Ed. 738, 740, '* * * laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of property or the parties.' See, also, *Pickens v. Merriam* (C.C.A. 9), 242 F. 363, 371, to the same effect. 'A suitor in equity', declared the court in *Speidell v. Henrici,* 15 F. 753, 756, 'is required to be "prompt, eager, and ready," in the pursuit of his rights.

> Diligence is an essential condition of equitable relief, and unexplained negligence is never encouraged.' In the language of the Supreme Court of the United States in affirming the decree dismissing the bill in equity in the last cited case, *Speidel v. Henrici,* 120 U. S. 377, 387, 7 S. Ct. 610, 612, 30 L. Ed. 718, 720, declared, 'Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights, and shows no excuse for his laches in asserting them. "A court of equity," said Lord Camden, "has always refused its aid to stale demands, where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court.' " (Italics ours.)

Appellants, by their own negligence, have permitted a final order to be made confirming the plan of reorganization and directing payments to the thirty-five creditors who filed their claims with the Special Master. As a result of this order, the debtor's position has become unalterably changed, and the rights of its subsequent creditors who became such in reliance on the fact that appellees had not filed their claims have become fixed.

> "A final order is one which either terminates the action itself, or decides some matter litigated by the parties, or *operates to divest some right in*

such manner as to put it out of the power of the court making the order, after the expiration of the term, *to place the parties in their original condition.*" (Italics ours.)

Strull v. Louisville & N. R. Co., 25 Ky. Law 665, 76 S. W. 181.

III.

THERE IS NO EVIDENCE TO SUPPORT THE ORDER OF THE DISTRICT COURT DENYING APPELLANT'S PETITION FOR DISCHARGE.

(Point No. 1, Tr. page 159.)

THE DISTRICT JUDGE ABUSED HIS POWER IN DENYING APPELLANT A DISCHARGE FOR THE REASON THAT THE REPORT OF THE SPECIAL MASTER, AFTER DUE HEARING, RECOMMENDING APPELLANT'S PETITION FOR DISCHARGE, WAS SUPPORTED BY UNCONTROVERTED EVIDENCE AND WAS NOT ERRONEOUS.

(Point No. 8, Tr. page 161.)

This appeal is from an order rejecting a Special Master's report. The Special Master's report was based upon oral evidence taken before him, all of which is contained in his report, and no evidence was introduced before the District Judge. As we have heretofore shown, the uncontroverted evidence before the Special Master clearly disclosed laches upon the part of appellees and that appellant acted in accordance with the orders of the Court.

CONCLUSION.

It is therefore respectfully submitted that the order of the District Court dated September 13th, 1939, denying the debtor's petition for a final decree and discharge be reversed, and that said District Court be directed to enter an order in conformity with the recommendations of the Special Master finding and decreeing that the plan of reorganization heretofore confirmed has been fully executed, accomplished and carried out in accordance with all of the terms and provisions of said plan and the orders of the District Court in connection therewith, discharging the debtor from all of its debts, claims and liabilities, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy and terminating and finally closing the proceedings.

Dated, San Francisco, California,
February 16, 1940.

LOUIS ONEAL,
TORREGANO & STARK,
By ERNEST J. TORREGANO,
Attorneys for Appellant.

No. 9400

United States Circuit Court of Appeals

For the Ninth Circuit

GARDEN CITY CANNING COMPANY,
Appellant,

vs.

WILLIAM ADDY, J. B. BOWEN, J. T. HEIDOTTING, R. J. SUTTON and JOHN SAUNDERS,
Appellees.

BRIEF FOR APPELLEES

LOYD E. HEWITT,
540 Second Street,
Yuba City, California,

BROBECK, PHLEGER & HARRISON,
MOSES LASKY,
A. M. DREYER,
Crocker Building,
San Francisco, California.
Attorneys for Appellees.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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CASES.

STATUTES AND GENERAL ORDERS IN BANKRUPTCY

TEXTS

No. 9400

United States Circuit Court of Appeals

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GARDEN CITY CANNING COMPANY,
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vs.

WILLIAM ADDY, J. B. BOWEN, J. T. HEIDOTTING, R. J. SUTTON and JOHN SAUNDERS,
Appellees.

BRIEF FOR APPELLEES

This is an appeal taken from an order denying appellant's application for a final decree of discharge under the provisions of former Section 77B of the Bankruptcy Act. The court below denied the application because of appellant's admitted failure to pay to appellees the amounts which the plan of reorganization proposed by the appellant and confirmed by the court in express terms provided should be paid to appellees on account of their respective claims. Those claims not only had been season-

ably filed with the court but they were listed in the schedules filed by appellant and acknowledged in the plan of reorganization itself.

The District Court's opinion is reported in 29 F. Supp. 13 and at page 147 of the record herein.

STATEMENT OF FACTS.

The facts are undisputed. Appellant is a corporation formerly engaged in the business of canning fruits and vegetables at San Jose, California. Appellees are farmers residing in Yuba County, California, to whom appellant was and is indebted for peaches sold and delivered. On February 6, 1936, appellant filed a petition for corporate reorganization under the provisions of Section 77B of the Bankruptcy Act, and on four occasions in those proceedings formally acknowledged that it was indebted to appellees. The petition for reorganization was approved by an order made the same day (R. pp. 1 and 2). As required by that order, appellant on March 3, 1936, filed a verified schedule of its creditors. That schedule included the names and addresses of appellees (R. pp. 2, 8, 9 and 10). Thereafter and on March 12, 1936, the *judge* made an order (R. pp. 13-23) permitting the debtor to remain in permanent possession of its estate and referring all issues and matters arising in the proceeding to one of the referees in bankruptcy as special master for hearing and report. That order also provided that all claims of creditors should be filed on or before June 15, 1936, (R. p. 18) and that a copy of the

order itself, or a summary thereof to be approved by the special master should be mailed to all creditors and stockholders and published in a newspaper (R. p. 22). *Neither that order nor any other order of the judge specified the place where proofs of claims of creditors should be filed.* This is conceded by appellant on page 11 of its opening brief. Debtor's counsel prepared a *purported* summary of the judge's order, had it approved by the special master (R. p. 32), and subsequently published and mailed it as required by the order. This summary *incorrectly* represented the judge's order of March 12, 1936 as requiring the claims of creditors "to be filed at the office of the special master, 1095 Market Street, San Francisco, California" (R. p. 104). *The judge's order contained no such requirement.*

On April 10, 1936, appellant filed its verified schedules of assets and liabilities by which appellant acknowledged itself to be indebted to appellees as follows:

W. M. Addy	$934.58
J. B. Bowen	633.29
J. J. Heidotting	308.91
R. J. Sutton	435.77
John Saunders	364.40

(R. pp. 29 and 30)

On May 1, 1936, appellant proposed a plan of reorganization (R. pp. 34 to 42, incl.). This plan reads in part as follows (R. pp. 36-38):

"General Unsecured Claims.

The general unsecured claims against the debtor are fifty-six in number. Of these claims, fourteen are

for less than $10.00. These fourteen claims, totaling $45.81, are as follows:

[List omitted as immaterial]

"The remaining unsecured claims against the debtor are as follows:

* * *	* * *
W. M. Addy	$934.58
* * *	* * *
J. B. Bowen	633.29
J. J. Heidotting	308.91
* * *	* * *
R. J. Sutton	435.77
John Saunders	364.40

"Debtor proposes to cause to be paid *to all of said general unsecured claimants,* 50 per cent of the amount of their claims in the following manner, to-wit:

(a) To all claimants whose claims are less than $10.00, 50 per cent of the amount of their claim in cash upon the entry of the order approving this plan of reorganization

(b) To all claimants whose claims are in excess of $10.00, 20 per cent of the amount of their claim in cash upon the entry of the order approving this plan of reorganization, 10 per cent of the amount of their claims four months after the entry of the said order, ten per cent of the amount of their claims eight months after the entry of the said order, and ten per cent of the amount of their claims one year after the entry of the said order."

As this court knows, plans of reorganization in 77B proceedings generally provide for payment to creditors by

class designation, without naming the creditors or the amounts of their claims. It is to be noted, by way of sharp contrast, that the plan in this case named the creditors, including appellees, *and unequivocally provided for the payment to appellees of 50% of the amounts stated to be due them respectively.* The unconditional character of this provision is not affected by Article VII of the plan (R. p. 42) quoted at page 5 of appellant's opening brief, which relates only to the time when the plan is to become effective.

A copy of this plan was sent to each of the appellees accompanying the purported summary of the order of March 12 (R. p. 4). Appellees were thus informed that the plan expressly provided for payment to them of 50% of their claims.

Appellees on June 4, 1936 *(ten days before the expiration of the time limit fixed by the judge)* filed their verified claims in proper form *in the office of the clerk of the court below* (R. pp. 4, 49 to 60, 89). The amounts of the claims so filed are identical with the amounts shown to be due appellees by the debtor's schedules and the plan of reorganization, except that appellee John Saunders claimed $1577.70 to be due him whereas appellant conceded only $364.40 to be due him.

On November 4, 1936, appellant filed with the special master a petition for confirmation of the plan above mentioned (R. p. 66). While the petition alleged, contrary to the fact, that the judge had ordered that proofs of claims be filed with the special master and purported to set forth in an exhibit "a list of all proofs of claims which have

been filed herein within the time within which claims could be filed", which list did not include the claims of appellees,—nevertheless the plan which the petition prayed be confirmed was the identical plan originally proposed by appellant. A copy of it was attached to the petition as part of it (R. 4). That plan in express terms provided that there should be paid by appellant to appellees, designated therein by name, 50% of the amounts stated to be due them. The special master set a time for the hearing of the petition, and the appellant gave notice thereof in the form set forth on page 106 of the Record. Although a copy of the plan itself had been sent, *in haec verba,* to each appellee, a copy of the petition for confirmation was not sent to any of them, but only the notice. There was nothing in the notice in any way indicating that appellant would contend that appellees' claims had not been properly filed, that appellees would be excluded from participation in the distribution provided for by the plan, or that the petition sought anything but confirmation of the plan exactly as originally proposed; and such in fact was all that the petition prayed for (R. p. 69).

A day or two after the notice was given, namely, on November 12, 1936, Mr. Loyd Hewitt, one of the attorneys for appellees, wrote the special master stating that he represented appellees and that he would not be able to be present at the hearing on the petition for confirmation of the plan, and requesting that the special master advise him of the amount of debts against appellant, the creditors who had voted in favor of the plan and the amounts of their respective claims (R. pp. 89-90). No response was made to this communication. The special master subse-

quently made a report recommending to the judge that the plan be confirmed (R. p. 67). Thereafter, on December 15, 1936, the judge made an order approving the special master's report and confirming the plan (R. p. 74). The plan so confirmed by the court was the same as that originally proposed by appellant and unconditionally provided for the payment to appellees of 50% of their claims.

On January 12, 1938, appellant filed its petition for a final decree adjudging that the plan had been completely executed and discharging the debtor (R. pp. 76-78). On January 22, 1938, appellees filed a petition objecting to the entry of a final decree on the ground that they had not been paid the amounts to which they were entitled under the plan (R. p. 79). The debtor filed an answer setting up as a defense the assertion that appellees' claims had been improperly filed with the clerk. The matter was referred to the special master for hearing and report. The special master filed a report recommending that the objections be overruled (R. p. 79 et seq.). The District Judge disapproved and rejected the report, and denied appellant's petition for a final decree without prejudice to its being renewed if and when appellant shall have satisfied the claims of appellees (R. p. 152). The appeal is taken from that order.

DISCUSSION.

I. THE ISSUE: WAS APPELLANT ENTITLED TO A DISCHARGE THOUGH IT PAID FIVE ADMITTED CREDITORS NOTHING?

The entry of a final decree under the provisions of Section 77B has the effect of discharging the debtor from its

debts and liabilities. As said by the United States Supreme Court in *Meyer v. Kenmore Granville Hotel Company,* 297 U. S. 160, 165,

> "The release of a debtor in a reorganization proceeding is contingent upon the performance of its part of the reorganization plan."

Admittedly appellant has not paid appellees 50%, or any, of their claims as required by the plan.

Appellant contends, however, (a) that appellees lost their rights by not having filed their claims with the special master, (b) that in any case, appellees are concluded by the decree confirming the plan, and (c) by laches. There is no merit in any of these contentions.

II. APPELLEES' CLAIMS WERE PROPERLY FILED WITH THE CLERK.

In determining whether appellees' claims were properly filed, every presumption must be indulged in favor of the regularity of the filing thereof. It is only if there is no other alternative that they can be held not to have been properly filed. The general attitude of the courts is expressed in *In re Brill,* 52 Fed.(2d) 636, thus:

> "If there be discretion to treat the claim as seasonably presented, it should be exercised favorably to the creditor. *The sole question is whether the court has power to do so.*"

In the present case appellees' claims were properly filed in the office of the clerk of the court for two independent reasons. First, the judge's order did not require filing with the special master. Second, the claims were

properly filed with the clerk irrespective of the judge's order of March 12, 1936.

A. The judge's order did not require filing with the special master.

Under Section 77B the power to fix the time, place and manner of filing or evidencing claims was vested not in the court, but exclusively in the *judge*. Subdivision (c) of that section provided:

> "Upon approving the petition or answer or at any time thereafter *the judge* * * * (6) shall determine a reasonable time within which the claims and interests of creditors and stockholders may be filed or evidenced and * * * the manner in which such claims and interests may be filed or evidenced and allowed * * *"

Section 1, subdivision (16) of the Bankruptcy Act defines the term "judge" as meaning "a judge of a court of bankruptcy not including the referee." (Title 11, U. S. C., Sec. 1, Subd. 16, in effect in 1936)

In the present case the only order made by the judge relating to the filing of claims was the order made on March 12, 1936. While that order prescribed the time for filing claims, neither that order nor any other order made by the judge prescribed the place where claims of creditors should be filed or the manner of filing or evidencing claims.

Since the order merely provided for the filing of claims without designating where, it meant filing with the *court,* that is, with the clerk. Even if the court could have superseded General Order XX, it did not do so.

Appellant, however, contends that, since the purported summary of the order which counsel for appellant prepared and caused the special master to approve stated that the claims should be filed with the special master, appellees' claims were improperly filed. *But the judge's order and not the summary controls,* and for at least three reasons:

(1) The judge's order authorized the master to approve a summary of the order, but not to change or modify it or to add to the provisions thereof. Appellant argues that since the master was to pass on objections to claims, the claims had to be before him. But that fact does not mean that claims had to be filed with him. He could easily obtain them from the clerk's office, just as does a referee in ordinary bankruptcy proceedings.

(2) By the express terms of the statute the judge and the judge alone had power to determine the manner in which claims should be filed or evidenced. Even though the judge had wished to empower the special master to prescribe the place where the claims should be filed, he could not do so. A special master under Section 77B has no power to make orders, in this respect differing from an ordinary Referee in Bankruptcy. By the terms of Section 77B, matters or issues could be referred to a special master, not for hearing and determination, but for hearing and report only. The special master's functions were limited to hearing and reporting; he could not make an order. No action of the special master had any binding effect until approved by the judge. Thus, in *In re A. B. Company,* 15 F. Supp. 152, the court said:

> "Section 77B(c)(11) of the Bankruptcy Act provides that the judge 'may refer any matters to a special master who may be one of the referees in bankruptcy, for consideration and report, either generally or upon specific issues'. According to the plain provision of the Act, referees acting as special masters cannot enter orders. Their purpose is solely to take evidence, consider the questions of law involved, and make their reports and recommendation to the court."

See, also:

Gerdes, Corporate Reorganization, Sec. 959.

(3) Moreover, even if the master had the power to make an order fixing the place of filing, he made no such order. He merely purported to summarize the court's order, and his summary was erroneous.

The special master's order approving the alleged summary of the judge's order of March 12, 1936, was a nullity insofar as it purported to require the filing of claims with the special master.

B. The claims were properly filed with the clerk irrespective of the judge's order of March 12, 1936.

At the time appellees filed their claims with the clerk, General Order In Bankruptcy XX provided:

> "Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed with either the referee or the clerk."

Under this General Order appellees were clearly entitled to file their claims with the clerk. Appellant contends that Order XX was inapplicable to proceedings under Section 77B because a special master in 77B proceedings is not a referee. This narrow contention cannot be sustained. Sending a matter to a special master is a reference; Section 77B(c)(11) states that the judge may "refer" to a special master.

Moreover, on May 13, 1935, the United States Supreme Court (295 U. S. 772) adopted General Order in Bankruptcy LII providing that "The following *additional* rules shall apply to proceedings under Section 77B of the Bankruptcy Act," specifying a series of additional rules, and thus indicating that the existing rules also applied to such proceedings. On June 1, 1936 (before appellees filed their claims) the Supreme Court amended the General Orders (see 298 U. S. 695) by expressly providing that Orders XVII, XVIII, XXI, XXVIII, XXIX and XLII should not be applicable to proceedings under Section 77B. No such exclusion was made of Order XX. Clearly, these amendments recognized the applicability of all General Orders not so amended to proceedings under Section 77B, or made them applicable.

In its opinion the District Court recognized that in the circumstances it was natural for appellees to assume that the proper place to file their claims was with the clerk. Even had the filing with the clerk been incorrect technically, the court had the power to consider the claims properly filed. Cf. *In re Derby,* 18 F. Supp. 995.

It is clear, we submit, that appellees' claims were properly filed. And therefore they could not be ignored or treated differently from other claims of the same class.

III. APPELLEES' CLAIMS WERE NOT BARRED BY THE ORDER CONFIRMING THE PLAN. ON THE CONTRARY, THE PLAN REQUIRED THE PAYMENT OF THESE CLAIMS.

Appellant contends that the decree confirming the plan operated as an adjudication that claims of creditors should have been filed with the special master and that no creditor whose claim was not so filed should be allowed to participate in the plan. The contention is unsound.

There is nothing in the plan, the petition for confirmation, the notice of the hearing thereof, the master's report thereon, or the order confirming the plan, which can be construed as in any way indicating that only creditors whose claims were filed with the special master should be allowed to participate. When the appellant filed its petition for confirmation of the plan, the only issue before the court was whether the plan complied with the statute and had been accepted by the requisite number of creditors. Where the claims should have been filed and what creditors had filed claims were wholly irrelevant questions. The only question to be determined was whether the plan should be confirmed. The court decreed that it should be confirmed and ordered the appellant to carry it into effect. *The plan so confirmed expressly provided that there should be paid to appellees fifty per cent of the amounts stated to be due them.* As the district court's opinion states "The plan of reorganization makes no provision for

payment upon presentation and acceptance of claims, but contains an unqualified offer to pay 50 per cent of the amount of the claims listed."

Appellant says (brief, p. 15) that it is not the plan as proposed but the plan as confirmed that governs. But here the plan confirmed was the plan proposed; there were no changes. Contrary to assertions of appellant (*e.g.* brief, pp. 11, 15), the plan as confirmed did not restrict payment to those creditors who had filed claims with the master; it did not order distribution to be made only to 35 creditors supposedly specified in the master's report.

Instead of being an adjudication that appellees should be denied participation, the decree confirming the plan is therefore an express and unconditional adjudication that appellees should be paid 50 per cent of their claims.

It may also be noted, contrary to a contention made on page 14 of Appellant's Opening Brief, that there is nothing in Section 77B making it mandatory on the court to restrict participation in a plan of reorganization to creditors who have filed claims. Under Section 77B(c)(6) a court can with propriety direct that distribution in accordance with a plan shall be made to creditors whose claims are shown on the debtor's schedules or on its books and records, or as shown in the plan itself. Thus *Gerdes* in his work on *Corporate Reorganization* says:

> "It is to be noted that there is no requirement that the judge must direct the claims to be filed. Section 77B provides that the judge shall determine a reasonable time within which claims and interests 'may be filed or evidenced'. It is therefore suggested that it may be provided by local rule or judge's order that

> proof of claims may be dispensed with and that all claims and interests shall be evidenced by the books and records as of a certain date. Opportunity should be granted to file claims however where the claimants challenge the accuracy of the Debtor's records."
>
> *II Gerdes,* Sec. 723, p. 1188.

It may further be noted that even had the court on December 15, 1936, confirmed a plan different from that proposed—which it did not do—the appellees could not have been bound thereby. It is elementary that, with respect to parties not appearing, proceedings cannot go beyond the scope of the notice which they have received. The only notice received by appellees was that appellant had petitioned for confirmation of the identical plan which it had originally proposed. That plan provided that consents to it should be filed with the master, but it did not provide that claims should be filed with him. Since the proper number of consents were received, appellees had no objection. By failing to oppose the petition for confirmation, they did not acquiesce in any modification of the plan proposed.

Although the debtor had sent to each creditor a copy of the plan, it did not send to any of them a copy of the petition for confirmation; it only sent to the creditors a notice (R. p. 106) which recited:

> "Please take notice that the debtor above named has filed herein a petition *for confirmation of the plan of reorganization heretofore filed herein,* which said plan has been accepted by creditors holding more than two-thirds in amount of all of the claims filed herein, and that Honorable Burton J. Wyman, Referee in Bankruptcy, as Special Master of the

> above entitled court, to whom these proceedings have been referred, has called a meeting of creditors of said debtor to be held at his office, Room 609 Grant Building, 1095 Market Street, San Francisco, California, on the 16th day of November, 1936, at the hour of 2 o'clock P. M. of said day, at which time evidence will be introduced by the debtor in support of said petition for confirmation of plan of reorganization, and at which time you may appear if you see fit and produce any evidence or argument in opposition to the confirmation of said plan."

Thus the notice of the petition for confirmation suggests no change in the plan. It referred to the petition for further particulars, but, if the petition had been consulted, the prayer would have been seen to be as follows (R. 64):

> "Wherefore, your petitioner prays that a meeting of creditors be called and held herein to consider said plan; that the form of notice to creditors attached hereto and marked Exhibit 'C' be approved by the court; that at said meeting of creditors said plan of reorganization be examined and that an order be made confirming said plan, and for such further and other order as may be just and proper in the premises."

Thus there was no prayer in the petition that only such creditors be paid whose claims had been filed with the special master.

The master's recommendation was that "the proposed order * * * wherein the approval of the *proposed* plan of reorganization is sought to be decreed, should be made the order of this court" (R. pp. 72, 73); and the court's order (R. p. 74) provides:

"It is Further Ordered that the plan of reorganization proposed by the debtor and accepted by creditors holding claims exceeding two-thirds in amount of all claims filed in these proceedings be and the same is hereby approved.

"It is Further Ordered that the debtor proceed forthwith to execute and carry into effect the said plan of reorganization as so approved and confirmed * * * by delivering to all its general unsecured creditors the cash consideration and the promissory notes provided for in said plan of reorganization, and to otherwise perform and carry out and cause to be performed and carried out all of the acts and transactions on its part required to be performed and carried out pursuant to said plan or reorganization."

The appellant says (brief, p. 10) that the master's report recommending confirmation of the plan contained a recital to the effect that the creditors had been directed to file their claims with the master, and it further says that on December 15, 1936 the court's order of confirmation adopted the referee's findings; it is therefore claimed (brief, p. 13) that the district court approved the master's exercise of power to direct that claims be filed in his office. The contention must fail for several reasons. First, the alleged finding was no part of the court's order. The appellees could not have appealed from the order of confirmation by which they were not aggrieved merely because it was prefaced by an erroneous recital. Second, the alleged finding was not an issue in the confirmation proceedings. The only issue before the court at the time was confirmation *vel non*. Third, the master had never purported to exercise power to direct that claims be filed in his office,

but had only mistakenly summarized the court's order of March 12, 1936. And, fourth, the court had no jurisdiction in December, 1936, to make a retroactive order changing the place for filing claims after the time for filing had elapsed and thereby to destroy creditor's rights already vested.

Appellant's contention that appellees' claims were barred by the decree confirming the plan is untenable. The appellees do not attack the plan. There is no reason, therefore, why they should have appealed from the order confirming it. They stand on the plan. By not paying the five appellees, the appellant has not complied with the plan, has not consummated it, and is not entitled to a decree adjudging that it has complied.

IV. APPELLEES ARE NOT ESTOPPED FROM OBJECTING TO APPELLANT'S APPLICATION FOR A FINAL DECREE.

Appellant devotes a large portion of its brief to the assertion that appellees should be held barred by laches from objecting to appellant's application for a final decree.

The shoe is on the other foot. The responsibility for what occurred, the laches, is to be attributed to the appellant, for three reasons: (1) misreading Judge Louderback's order of March 12, 1936 as requiring filing claims with the master and preparing a wrong summary; (2) acting upon the basis of the wrong summary instead of the court order; and (3) failing to examine the clerk's files to ascertain what claims had there been filed. There is no laches on the part of appellees; they filed their claims as required by the court's order. It was not laches to refrain from appearing at the hearing on the petition for confir-

mation on November 16, 1936, since the petition itself provided payment to these appellees. The appellant quotes (brief, p. 23) the master's conclusion that there was laches because the only way in which the appellees can be paid is to

> "(1) compel the debtor, which heretofore has acted strictly in accordance with the orders of this court, itself directly to raise the money with which to make said payments, or (2) compel said debtor to proceed against those creditors of the same class as the negligent creditors to repay into debtor's estate, sufficient money to take care of these unpaid pro rata payments in each instance."

Of course, the debtor had not acted in accordance with the orders of the court. Beyond that, the argument is beside the point. The only question now before the court is whether the appellant should be granted a discharge from its indebtedness to appellees. The appellant is entitled to such a discharge only if it has complied with its part of the plan of reorganization. That it has not done so is evident from the facts shown by the record. The court below has not yet been called upon to determine, and did not determine, whether appellees can compel appellant to satisfy its claims. It has not been asked to determine and has not determined whether other creditors of the appellant should be required to return the whole or any part of the allowance which they have received to the end that the appellees might be paid. That question can only be determined in subsequent proceedings below on the basis of all the facts of the case developed after due notice to all parties concerned.

But one point is indisputable: appellant is not entitled to a discharge and an adjudication that it has carried out the plan of reorganization.

The debtor's contention that it may be unable to obtain funds to pay the five farmer appellees for the fruit it purchased from them is no ground for granting a discharge because: (a) the debtor is seeking to take advantage of a pure windfall (lack of filing with the special master) to destroy just claims *of which debtor was fully aware at all times; (b) by filing the Petition for Reorganization listing these appellees as parties to whom 50 per cent would be paid, the debtor represented to the court that it would be financially able to pay them if the plan was confirmed.*

The names and addresses of appellees were set forth in the list of creditors filed by appellant. Their claims were set forth in the schedules of assets and liabilities, and they were set forth again in the plan of reorganization. Appellant has never been misled by any conduct of appellees. Rather, if appellant is granted a discharge, appellees will have been misled by appellant. By the very terms of the plan of reorganization appellant unconditionally undertook to pay to appellees 50 per cent of their respective claims. In view of that unconditional undertaking appellees would have been justified in refraining from filing any claims at all, except in Saunders' case where the claim was greater than indicated in the plan. If appellant suffered any prejudice by overlooking the claims filed with the clerk, that prejudice resulted not from any conduct or inaction of appellees but from the error of appellant in ignoring its own plan and also in assuming that the

special master could both abrogate General Order XX and modify the Judge's order with respect to the place of filing.

It is suggested in appellant's brief that the appellees were guilty of delay in not acting to apprise the debtor of their right to share for 13 months after the plan was confirmed. The contention is based on the erroneous notion that the objections to the petition for a final decree are objections to the plan of reorganization, whereas the appellees stand on the order of confirmation, and their objections to the petition for a final decree were based upon the fact that the appellant had not complied with that plan. The objections were filed by the appellee at the earliest possible moment. The debtor did not file its report claiming complete execution of the plan and praying for a discharge until January 12, 1938. (R. 76) The court by order of the same day, provided for the giving of "notice to the creditors of this report and request for discharge". Promptly on January 22, 1938, the objections were filed, not to the plan but to the claim of the debtor that it had completely executed the plan.

As a further claim of estoppel, appellant argues (brief, p. 20) that the claim filed by appellee Saunders exceeded the amount conceded to be due him by the appellant, and that since the latter had no knowledge that Saunder's claim had been filed with the clerk, it was unable to file objections to the allowance of the claim in the increased amount. It suffices to say in reply that the district court's order denying a final decree took cognizance of the situation and provided (R. 152) that the debtor might have a

period of ten days after the order in which to file written objections to the allowance of the Saunder's claim, thus giving the debtor the opportunity to contest the amount.

CONCLUSION

Of miscellaneous contentions by appellant, nothing need be said. For example, it is argued (brief, p. 25) that the special master's report was based upon oral evidence taken before him and that no evidence was introduced before the district judge. The question involved in the case is one of law and not of fact. There is no dispute as to the material facts.

The court's order was just and equitable. By means of 77B proceedings the debtor has cut its obligations in half and should not be permitted to eliminate *in toto* certain known farmer creditors. The district court properly refused to stamp with approval the debtor's failure to pay.

The order of the district court is proper and it should be affirmed.

Respectfully submitted,

Loyd E. Hewitt,
Brobeck, Phleger & Harrison,
Moses Lasky,
A. M. Dreyer,
Attorneys for Appellees.

Dated: March 28, 1940.

No. 9400

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 16

GARDEN CITY CANNING COMPANY,
Appellant,

vs.

WILLIAM ADDY, J. B. BOWEN, J. T. HEIDOTTING, R. J. SUTTON and JOHN SAUNDERS,
Appellees.

APPELLANT'S REPLY BRIEF.

LOUIS ONEAL,
First National Bank Building, San Jose, California,
TORREGANO & STARK,
Mills Building, San Francisco, California,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 9400

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Appellees.

APPELLANT'S REPLY BRIEF.

Appellees commence their statement of facts with the admission that the facts are undisputed. They however ignore the facts developed during the course of the hearing before the Special Master on the debtor's application for a discharge. We will refer to these facts in connection with our reply to part IV of appellees' brief.

APPELLEES' CLAIMS WERE NOT PROPERLY FILED WITH THE COURT.

Appellees' first argument is to the effect that under the provisions of Section 77B of the Bankruptcy Act the judge alone could designate the place where claims

could be filed. There are three answers to this contention:

1. The judge referred the proceedings generally to the Special Master (Tr. page 16);

2. The judge having failed to expressly state in his order of March 12th, 1936 where claims were to be filed, and Section 77B of the Bankruptcy Act being silent on this point, the Master had authority to designate the place pursuant to Equity Rule 62 (cf. Appellant's Opening Brief page 12);

3. Even in the absence of Equity Rule 62, the Master's designation was binding because he reported to the Court that notice was given to creditors to file claims in his office and his report was approved by the District Judge. Appellees in effect admit the validity of this argument (Appellees' Brief page 10) when they state: "No action of the Special Master had any binding effect until approved by the judge." The action of the Special Master approving the notice to creditors which directed creditors to file their claims in the office of the Special Master was approved by the District Judge.

GENERAL ORDER IN BANKRUPTCY XX WAS INAPPLICABLE TO THESE PROCEEDINGS.

As the Master pointed out in his opinion (Tr. pages 138-139), General Order XX must be read in conjunction with Section 57C of the Bankruptcy Act and is clearly inapplicable to a proceeding instituted under

Section 77B prior to the entry of an order of liquidation. No order of liquidation has ever been entered in this case. The provisions of Section 77Bc(6) to the effect that the judge shall designate the place where claims are to be filed are clearly inconsistent with the provisions of Section 57C and General Order XX.

General Order XX must also be read in conjunction with Section 51 of the Bankruptcy Act making it the duty of the clerk to transmit to the Referee upon his application all papers filed with the clerk after the reference. Were the term "Referee" to be construed as referring to a Special Master under Section 77B, then we find that the claims were not transmitted by the clerk, and this through no fault of appellant. Appellees' counsel has admitted that he knew that the claims were not to remain in the clerk's office (Tr. page 88). He requested the clerk to act as his agent in forwarding the claims to the "proper Referee." Assuming a duty on the clerk to comply with this request, his failure so to do cannot be charged to appellant.

APPELLEES ARE BARRED BY THE ORDER CONFIRMING THE PLAN AS THE PLAN DID NOT REQUIRE THE PAYMENT OF APPELLEES' CLAIMS.

Appellees' third argument is an attempted answer to appellant's contention that the order confirming the plan of reorganization, after having become final, was an adjudication of the rights of appellees to receive payments under the plan of reorganization.

The entire argument advanced by the appellees under this heading is based on the fact that the debtor's schedules admitted that appellees were creditors and that the plan of reorganization provided for payment to all creditors listed therein in the amounts set forth after their names (these amounts differed from some of the claims as filed). Appellees argue from this premise that the Master's report and the Court's order approving and adopting the same and confirming the plan necessarily directed that payment be made to all creditors enumerated in the plan.

If this argument were valid, it would apply to all creditors who did not file claims[1]—the fourteen creditors who failed to file claims at all, as well as the five appellees who disregarded the notice received by them and filed their claims with the clerk instead of with the Special Master.

The argument is not valid because the District Judge's order of March 12th, 1936 specifically stated that creditors must file claims in order to participate in the plan of reorganization (Tr. page 18).

The debtor's petition for confirmation of the plan of reorganization enumerated the thirty-five creditors who had filed claims (Tr. page 65) and who, therefore, under the order of March 12th, 1936 were entitled to participate in payments under the plan. The notice of the hearing of the petition for confirmation of the plan specifically referred creditors to the contents of the petition (Tr. page 106).

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[1]Appellees concede this. cf. Appellees' Brief, page 20, line 23.

The Master, in his report, recited that these thirty-five creditors had filed claims (Tr. page 68). The Master's report, accompanied by the debtor's petition for confirmation of the reorganization plan, came on for hearing before the District Court and that Court adopted the Master's report as its findings and confirmed the plan (Tr. page 74). Under the order of March 12th, 1936 only creditors who had filed claims could participate in payments under the plan. Obviously, therefore, the provisions of the plan and of the order confirming the same with reference to the distribution of the payment to creditors could only refer to those creditors who had filed claims.

We therefore respectfully repeat that appellees had several opportunities to call the Court's attention to the fact that the petition for confirmation did not provide for payments to appellees. When they failed to appear before the Master on the hearing of the petition for confirmation, when they failed to appear before the District Judge at his hearing on the Special Master's report and when they failed to appeal from the order approving the Master's report and confirming the plan of reorganization, their right to participate in payments under the plan was forever lost.

> "* * * The provisions of the plan *and* of the order of confirmation shall be binding upon * * * all creditors, secured or unsecured, whether or not affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have accepted it."
>
> Bankruptcy Act Section 77Bg.

It will be noted that Congress uses the words "plan *and* order." The question raised by the petition for discharge is whether the debtor has complied with the plan as confirmed. As we heretofore pointed out, the order of confirmation found that only thirty-five creditors, which did not include appellees, filed claims and this order, when read with the order of March 12th, 1936, directed payment to these thirty-five creditors referred to in the Master's report.

APPELLEES ARE ESTOPPED FROM OBJECTING TO APPELLANT'S APPLICATION FOR A FINAL DECREE.

Appellees' answer to appellant's contention that appellees are barred by their laches from objecting to the petition for a discharge is predicated on their assertion that appellant is seeking to take advantage of a "windfall".

Appellees have disregarded the testimony adduced before the Master, on the basis of which the Master made his finding of laches.

The failure of appellees to file their claims with the Master did not result in a "windfall". Appellant borrowed just sufficient funds to make the payments required under the plan and it is now insolvent and has no assets other than those pledged to Pacific Can Company, the company which advanced the funds to consummate the plan of reorganization.

Examining the situation purely from the standpoint of the equities involved, this question is presented: Should the loss fall on appellees, who admittedly re-

ceived the notice stating that claims should be filed with the Special Master (Tr. page 3 and Appellees' Brief page 5) but who chose to disregard the same and to disregard the notice of the hearing of the petition for confirmation of the plan and who therefore were in a position to have prevented their loss, or upon the Pacific Can Company and the new creditors, some of whom, like appellees, are farmers (Tr. page 114) and who extended credit in reliance on the fact that the order confirming the plan of reorganization provided for distribution to only the thirty-five creditors who had filed claims.

Whether directly involved in these proceedings or not—it is the fact that it is on these new creditors that the loss must fall, not on the debtor who is already insolvent.

In *In re Wise Shoe Company,* decided December 11th, 1939 and reported in Commerce Clearing House Bankruptcy Law Service ¶ 52266 (not officially reported as yet) the District Court for the Southern District of New York had occasion to pass upon an application to reopen a reorganization proceeding and amend a plan of reorganization at the instance of a creditor who contended that the plan of reorganization amounted to a fraud on it and that it had no knowledge at the time that the plan would have an adverse effect on it. The Court pointed out that if the petitioner had made his objection prior to confirmation, the objection would probably have been sustained but that in the meantime new money had been invested in the enterprise on the strength of the order confirming the plan of reorganization.

> "It would be inequitable to make a substantial change in the plan of reorganization at this late day, to the prejudice of those who have invested new money in the interval."

Counsel for appellees, throughout their brief, lose no opportunity to refer to their clients as farmers. We can only assume that they do so to create an inference that their clients are of a class requiring special protection from the Court. However, it appears from the record that appellees were represented by counsel at all times—at the time when the order of March 12th, 1936 was made (Tr. page 117), at the time when the claims were filed with the clerk [appellees' counsel, not appellees themselves, forwarded the claims to the clerk] (Tr. page 84), and at the time when the Master heard the petition for confirmation of the plan (Tr. page 89).

We heretofore pointed out that counsel for appellees knew that he was not filing the claims at the correct place when he forwarded them to the clerk (Tr. page 88). Neither counsel for appellant nor appellant itself knew that the claims had been filed with the clerk until appellees filed their objections to appellant's petition for a discharge on January 22nd, 1938 (Tr. page 111 ff).

CONCLUSION.

In conclusion, it is respectfully submitted that inasmuch as appellant has carried out its plan of reorganization by paying all creditors who were entitled to

participate in the plan under the order confirming the plan and pursuant to the order of March 12th, 1936, and inasmuch as appellees allowed the order confirming the plan to become final without taking an appeal therefrom, appellant is entitled to a decree of final discharge pursuant to the recommendations of the Master.

Dated, San Francisco, California,
April 19, 1940.

LOUIS ONEAL,
TORREGANO & STARK,
By ERNEST J. TORREGANO,
Attorneys for Appellant.

No. 9403

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

THE OREGON SHORT LINE RAILROAD COMPANY, a corporation, and SAINT PAUL-MERCURY INDEMNITY COMPANY OF ST. PAUL, a corporation,

Appellees.

Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

JOHN A. CARVER,
United States District Attorney,

E. H. CASTERLIN,
PAUL S. BOYD,
Assistant United States District Attorneys,
Boise, Idaho,
Attorneys for Appellant

GEORGE H. SMITH,
Salt Lake City, Utah,
H. B. THOMPSON,
L. H. ANDERSON,
Pocatello, Idaho,
Attorneys for Appellees. [2*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, in and for the District of Idaho, Eastern Division

No. 1069

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE OREGON SHORT LINE RAILROAD COMPANY, a corporation, and SAINT PAUL-MERCURY INDEMNITY COMPANY OF ST. PAUL, a corporation,

Defendants.

COMPLAINT

Comes now John A. Carver, the duly appointed, authorized, acting and proper United States Attorney for the District of Idaho, and for a cause of action against the above named defendants and in favor of the above named plaintiff, alleges as follows:

I.

That the said John A. Carver institutes and brings this action in the name of the United States of America for and on behalf of the Shoshone and Bannock tribes of Indians for damages accruing by reason of the killing and maiming of certain Indian persons hereinafter named, and in the manner and form hereinafter described.

II.

That the United States District Court for the District of Idaho has jurisdiction of this action for the reason that the United States of America is party plaintiff herein, and for the further reason that the said action is authorized and directed by the provisions of an Act of Congress under date of September 1, 1888 (25 Stat. L. 452).

III.

That the defendant, Oregon Short Line Railroad Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Utah; that said corporation is now and at all times material to this action has been doing business in the State and District of Idaho as a railroad and common carrier, having its principal [3] place of business in Idaho at the City of Pocatello in the State and District of Idaho, Eastern Division.

IV.

That said defendant, Oregon Short Line Railroad Company, is the successor in interest of Utah and Northern Railway Company, a railway company named in the Act of Congress herein above mentioned, to-wit: 25 Stat. L. 452.

V.

That the defendant, Saint Paul-Mercury Indemnity Company of St. Paul is a corporation organized and existing under and by virtue of the laws

of the State of Delaware and doing and authorized to do business in the State and District of Idaho with an agent upon whom process may be served in the State of Idaho as provided for in Title 6, Section 7, U. S. C. A.

VI.

That on the third day of July 1868, at Fort Bridger in the territory of Utah, the United States of America on behalf of its citizens, and the Shoshone and Bannock tribes of Indians on behalf of its members, in order to maintain peace among the parties, made and concluded a treaty wherein said parties solemnly agreed, among other things, as follows:

> "And the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon or reside in the territory described in this Article for the use of said Indians, and henceforth they will and do hereby relinquish all title, claims or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid." (15 Stat. L. 673—11 Kappler 1021)

That the Indian reservation and territory therein above referred to is the Fort Hall Indian Reserva-

tion in the State and District of Idaho; that the said defendant, Oregon Short Line Railroad Company or its predecessor, was not one of the persons designated or authorized to go upon said lands in said treaty. [4]

VII.

That the said Indians for whom said territory and lands were reserved, dreaded the approach of the white man's commerce, and particularly the approach of the locomotive and/or iron horse, a dangerous instrumentality which said Indians anticipated would multiply the probability of death and destruction among members of their respective tribes and their descendants.

VIII.

As a consequence of the matters and things herein above set forth and in order that commerce and civilization might cross the prairies and extend to the Pacific coast, and that a railroad, the predecessor of the said Oregon Short Line Railroad Company, be privileged to operate over said Indian Reservation, the Congress of the United States of America reconsidered the treaty provisions herein above referred to as will more particularly appear in a report made to Congress from the Committee on Indian Affairs, referred to the House calendar and ordered to be printed on June 5, 1888, a copy of which said report is hereto attached, marked Exhibit A and by reference made a part hereof. That it was the intention of Congress as therein ex-

pressed and provided that every interest of the Shoshone and Bannock tribes of Indians be jealously guarded and protected against damages in all cases suffered by the Indians on account of the privilege to be granted said railroad.

IX.

That in order to carry said intention into effect and for the purpose of jealously guarding and protecting said Shoshone and Bannock tribes of Indians and their posterity and in consideration of permitting and granting the privilege to the Utah and Northern Railway Company, its successors and assigns, to construct, operate and maintain a railroad system and/or business upon, over and across said Fort Hall Indian Reservation, the said Congress of the United States and said Indians entered into a further memorandum of agreement and the said Congress enacted a statute under date of September 1, [5] 1888 (25 Stat. L. 452) providing among other things, that said Utah and Northern Railway Company, its successors and assigns, execute a bond in the penal sum of $10,000.00 for the use and benefit of the Shoshone and Bannock tribes of Indians, the conditions of said bond being by statute provided as follows:

> "That said railway company shall execute a bond to the United States to be filed with and approved by the Secretary of the Interior in the penal sum of $10,000.00 for the use and benefit of the Shoshone and Bannock tribes

of Indians conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes or either of them or of their livestock, in the construction or operation of said railway or by reason of fires originating thereby; the damages in all cases, in the event of failure by the railway company to effect an amicable settlement with the parties in interest, to be recovered in any court of the territory of Idaho having jurisdiction of the amount claimed, upon suit or action instituted by the proper United States Attorney in the name of the United States;"

That the memorandum agreement herein mentioned is contained in the Act of Congress of September 1, 1888 hereinabove referred to.

X.

That the defendant, Oregon Short Line Railroad Company, is the successor in interest of Utah Northern Railway Company and as such the said defendant is now and at all times material to this action has, by reason of the terms of said solemn treaty herein mentioned as modified by said memorandum agreement herein referred to and by virtue of the special Act of Congress mentioned herein, operated and maintained a railroad system running railroad engines, cars and trains, across, over, through and upon said Fort Hall Indian Reservation.

XI.

That for the privilege of maintaining and operating said railroad trains, engines and cars, over, through and across said Fort Hall Reservation and by reason of the provisions of said treaty agreement, and the Act of Congress herein mentioned and by reference made a part hereof, the defendants, Oregon Short Line Railroad Company and Saint Paul-Mercury Indemnity Company of St. Paul, made, executed and delivered to the United States for the use and benefit of [6] the Shoshone and Bannock tribes of Indians and parties in interest, a bond as required by said special Act and in consideration of the privilege herein referred to, the said bond being in words and figures as follows, to wit:

"BOND

"Be it known, That we, the undersigned, Oregon Short Line Railroad Company, a corporation, successor to the Utah and Northern Railway Company, as principal, and Saint Paul-Mercury Indemnity Company of Saint Paul as surety, are held and firmly bound unto the United States of America in the penal sum of ten thousand dollars ($10,000), lawful money of the United States, for which payment, well and truly to be made, we and each of us bind ourselves, our successors, assigns, heirs, administrators, and executors, jointly and sever-

ally, firmly by these presents. The condition of this obligation is such that,

"Whereas, The Congress of the United States, by the Act of September 1, 1888 (25 Stat. L., 455), granted a right of way to the Utah and Northern Railway Company over and across the Fort Hall Indian Reservation in the State of Idaho, and

"Whereas, Section 14 of said act requires that the company shall execute a bond to the United States, to be filed with and approved by the Secretary of the Interior, in the penal sum of $10,000, for the use and benefit of the Shoshone and Bannock Tribes of Indians, conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, or of their live stock, in the construction or operation of said railway, or by reason of fires originating thereby;

"Now, therefore, if the said Oregon Short Line Railroad Company, its successors or assigns, shall make full satisfaction for any and all such deaths, injuries, or damages, then this obligation shall be null and void; otherwise, to remain in full force and effect.

"Signed, sealed, and delivered, on this 30th day of July, A. D. 1935.

OREGON SHORT LINE
RAILROAD COMPANY
(Principal)

[Seal] By (s) C. R. GRAY
Its President

Attest:

[Seal] (s) E. M. KINDLER
Assistant Secretary

[Seal] SAINT PAUL-MERCURY INDEMNITY COMPANY OF ST. PAUL
(Surety)

By WM. F. PATTERSON
Attorney-in-fact

Department of the Interior
Washington
Approved
(s) OSCAR T. CHAPMAN
Assistant Secretary
5-3 (undecipherable)" [7]

XII.

That the said defendants by reason of said bond and the laws applicable thereto, became obligated in the event that any member of the Shoshone and Bannock tribes of Indians were killed or maimed, to make due payment for all damages accruing therefrom; that the said defendants agreed and promised according to the terms of said bond to

make due payment for any and all damages accruing by the killing or maiming of any Indian belonging to either of the tribes herein above mentioned and agreed and promised to pay said bond and/or obligation according to its tenor and the provisions of the Act of Congress herein above referred to, and that damages be paid in all cases in the absence of an amicable settlement made by said defendants.

XIII.

That on the 19th day of January, 1938, the defendant, Oregon Short Line Railroad Company, while operating a railroad train over, through and across said Fort Hall Indian Reservation at a point where said railroad crosses what is known as the Fort Hall Agency Road near corner section 35-36, T. 4 S., R. 34 E. B. M., the same being on the said Fort Hall Indian Reservation in the County of Bingham, State and District of Idaho, ran said railroad train into a Ford V-8 automobile occupied by Ira Ninnevoo, Esther Queep, Daisy Thomas, Genevieve Queep and an unborn infant of Esther Queep, the said persons being Indians and members of the Shoshone and Bannock tribes of Indians residing on the Fort Hall Indian Reservation and persons for whose benefit the treaty, agreement, special act and bond herein mentioned and set forth were made, passed, enacted, concluded and executed and the said persons being wards of the United States Government and having a right to be on said Fort Hall Reservation and at the place and point

where said Indian persons were maimed, killed, mutilated and destroyed; that the said railroad train operating as aforesaid did run into and kill, main and injure said Indian persons as follows, to wit: killed Ira Ninnevoo, Esther Queep, Daisy Thomas, the unborn infant of Esther Queep; injured and maimed Genevieve Queep, a minor Indian person of [8] the age of about five years, in that the said train at the time of the collision herein mentioned did cut, bruise and injure about the head, legs and body the said Genevieve Queep.

XIV.

That the said defendants have failed, neglected and refused to make an amicable settlement or any settlement whatsoever or at all with the parties in interest herein as required by said bond and the provisions of the Act of Congress of September 1, 1888, herein above referred to, and have failed, neglected and refused to observe and pay the obligations incurred by said defendants under said bond and Act of Congress, although demand for payment has been made. That the funeral expenses incurred for the burial of the Indian persons killed as herein above set forth amounts to approximately $2,500. That by reason of the matters and things herein alleged and set forth there is due, owing and unpaid from the defendants to the plaintiffs for the use and benefit of the Shoshone and Bannock tribes of Indians and the parties in interest the sum of $10,000. That the Shoshone and Bannock tribes

of Indians and the heirs, representatives and parties in interest of the deceased persons have been damaged in excess of $10,000.

Wherefore, plaintiff demands judgment against the defendants jointly and severally in the sum of $10,000 with interest thereon until paid and for its costs and disbursements herein incurred.

JOHN A CARVER
United States Attorney for
the District of Idaho
FRANK GRIFFIN
Asst. U. S. Attorney for
the District of Idaho

(Duly verified) [9]

EXHIBIT A

"SHOSHONE AND BANNACK INDIANS

June 5, 1888—Referred to the House Calendar and Ordered to be printed.

Mr. Perkins, from the Committee on Indian Affairs, submitted the following

REPORT

(To accompany bill H. R. 8662.)

The Committee on Indian Affairs, to whom was referred the bill (H. R. 8662) to accept and ratify an agreement made with the Shoshone and Bannack Indians for the surrender and relinquishment to the United States of a portion of the Fort Hall

Reservation, in the Territory of Idaho, for the purpose of a town-site, and for the *gant* of a right of way through said reservation to the Utah and Northern Railway Company, and for other purposes, has carefully considered the provisions of the bill, and recommend that it do pass, and submit the following report:

This bill was drawn in the Interior Department and is intended to fully cover and protect the interest of the Indians concerned and to provide room for railroad shops and a town-site, imperatively demanded by the necessity of the case, as set forth in the following extracts from a letter from the honorable Secretary of the Interior, dated February 4, 1888:

> (1) The Utah and Northern and Oregon Short Line Railroads cross each other and form a junction at a point within the boundaries of the reservation known as Pocatello Station, where a settlement has gradually grown up, composed mainly of employes of said railroads, with their families, together with other people drawn thereto, for whom sufficient land is represented to be absolutely needed for dwelling and for other purposes, to avoid the conflicts and troubles with the Indians arising from trespass upon the reservation; and,
>
> (2) To ascertain and fix the compensation that should be paid to the Indians for land occupied by the Utah and Northern Railway Company as right of way, station grounds, etc.,

upon the reservation for its line of road, running north and south, already constructed and in operation. The right of way of the Utah and Northern Railway Company through the reservation, granted by the Act of July 3, 1882 (22 Stat. 148), for its Oregon branch running east and west, reported as subsequently assigned to the Oregon Short Line Railway Company, is 100 feet wide, except at Pocatello Station, where it is 200 feet wide with an additional tract as that point comprising 30.45 acres for station purposes, making a total of about 772 acres, for which it was required to pay $6,000. being at the rate of about $7.77 per acre.

Under the law granting the right of way (200 feet wide) to the Utah and Northern Railway Company through the public lands (17 Stats., 612), as subsequently amended (20 Stats., 241), that corporation filed in the Department a series of fifteen maps of definite location of its road, eleven of which were approved March 6, 1882; the other four, showing the line of the road through the fort Hall Reservation, were disapproved March 27, 1882, for the reason that the law granting right of way through the public domain did not entitle it to go through the Indian reservation, which is not public lands within the meaning of the act, and, further, that the consent of the Indians had not been formally obtained, and no compensation had

been made to them for the land occupied, the road having already been constructed. A detailed history of this matter is set out in a message sent by you to Congress on the subject December 21, 1885, and printed in Senate Ex. Doc. No. 20, Forty-ninth Congress, first session.

* * * * * * *

As the embarrassments of the situation, resulting from the rapid growth of population of the town within the limits of the reservation and upon the land of the Indians, were daily increasing, the Department in order to place the matter in shape for definite and speedy action by Congress, instructed one of the United States Indian inspectors and the United States Indian agent for the Fort Hall Indian Agency to confer with the Indians, examine the whole matter, and prepare a plan for the settlement of the questions involved. They called the Indians together in council, to whom, it is reported, they carefully and fully explained the matters, and negotiated with them the agreement herewith submitted, for which the Indians cede and relinquish to the United States, to be disposed of for town-site purposes, at Pocatello, or otherwise, as Congress may direct, for the benefit of the Indians, a tract of 1,840 acres of land, saving therefrom as much as has been heretofore and is by the present agreement relinquished to the United States for the use of the Utah and Northern

and the Oregon Short Line railroads, all of which is more clearly shown in the accompanying plats.

The right of way to the Utah and Northern Railway Company through the reservation, north and south, provided for in the agreement, is 200 feet wide (the same as allowed to it through the public domain); this, with the rights of way 200 feet wide at Pocatello Station, already granted by law (22 Stat., 148) to the same company for its line running east and west, make a total width of 400 feet as right of way for the two roads at that point, and the 30.45 acres already granted by law for station and depot purposes to one road, together with the 20 acres for like purposes provided by this agreement for the other road, make a total of 50.45 acres for station and depot purposes for the two roads at their junction at Pocatello Station. The two roads at that point are constructed and run for some distance on the same road-bed, and use in part the same rails (one being a narrow-g*ua*ge road); in view of which it is considered by the Department that the right of way to the Utah and Northern Railway Company for its road running north and south should be there limited to 100 feet in width, making a total right of way 300 feet wide for both roads at Pocatello Station. The draught of the bill has been so framed as to provide for this limitation; this with the ample station

> and depot grounds there, would seem to afford sufficient land for the ordinary business of the two railroads, reported by the Commissioner of Railroads to be now under one and the same management—that of the Union Pacific Railway Company.
>
> * * * * * * *
>
> The draught of bill provides that the land ceded for the townsite (except the portions heretofore granted and those now proposed to be granted for railroad purposes) shall be surveyed and laid out in lots, appraised, and sold at public auction to the highest bidder, the proceeds to be deposited in the Treasury to the credit and for the benefit of the Indians. It also provides for access to and use by the citizens of the town in common with the Indians of the water from any river, creek, stream, or spring flowing through the reservation lands in the vicinity of the town-site.

The junction of these two railroads at Pocatello will, it is believed, become a town of considerable size and business, assisting and benefited by the development of the country. In this age of progress it is impossible, and it certainly is not desirable, to hinder the building of railroads by blocking the natural routes by great reservations for Indians or for any other purpose. Every part of our country must be brought in communication by the best means with every other part, and when

the railroad companies ask nothing but the right of way they should have it in the interest of the people. By this bill the Utah and Northern Railway Company are to pay at the rate of $8. per acre for the right of way and station grounds; 1,840 acres are to be surveyed and sold at not less that $10 per lot, the money to be paid to the Secretary of the Interior and to bear interest at 5 per cent. per annum, and principal and interest to be expended according to his judgment for the support and benefit of the said Indians. This land is now of no benefit to them, and the money for which it is to be sold can be most usefully and profitably invested for them in irrigating ditches, houses, cattle, wagons and implements, wheat, etc. The town, which will certainly grow up, will give them a convenient market for their farm productions and will exercise a most salutary and civilizing influence upon them. The rights of the settlers upon the reservation to be sold in lots, are fully protected by the bill.

The fifteenth section of the bill takes from the railway company any inducement to "assist in any effort looking towards the changing or extinguishing the present tenure of the Indians in their remaining lands", or to "attempt to secure from the Indian tribes any further grant of land or its occupancy than is hereinbefore provided".

It is provided that when any of the lands granted to the railway company for right of way and station grounds shall cease to be used for purposes

specified, it shall revert to the Indians. All employes of the railway company living on the granted lands shall be subject to the provisions of the Indian intercourse laws and such rules and regulations as may be established, etc. Provision is made for indemnification by the railway company to the Indians for killing or maiming the Indians or their stock; also for fencing in the railway track where it runs through the improved lands of the Indians. We believe, in short, that every interest of the Indians has been jealously guarded and protected.

It is the settled policy of Congress to encourage the settlement of the lands in the Territories and the development of their vast natural resources, that not only homes for our people may be provided, but fields for the exercise of their industry, energy, enterprise, labor, and capital may be opened up. These objects can best be accomplished by the building of lines of swift and easy communication and transportation by private capital, and therefore we think no great body of land should be reserved for any purpose to stand as an impediment to these great thoroughfares of the people.''

[Endorsed]: Filed Dec. 13, 1939.

[Title of District Court and Cause.]

SUMMONS IN A CIVIL ACTION

To the above named Defendants:

You are hereby summoned and required to serve upon John A. Carver, United States District Attorney for the District of Idaho, plaintiff's attorney, whose address is Boise, Idaho an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be against you for the relief demanded in the complaint.

[Seal] W. D. McREYNOLDS,
Clerk of Court.
By ETHEL HOUSE,
Deputy Clerk.

Date: November 13th, 1938.

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the day of 19 , I received the within summons.

Nebraska		Idaho	
Marshal's Costs		Marshal's Costs	
Service	$2.00	Fees	6.00
Mileage	.....	Exp	.....
Expense	.....	Total	6.00
Total	$2.00		

RETURN ON SERVICE OF WRIT

United States of America,
District of Idaho—ss.

I hereby certify and return that I served the annexed Summons on the therein-named Oregon Short Line Railroad Company by handing to and leaving a true and correct copy thereof with H. B. Thompson, Statutory Agent for the Oregon Short Line Railroad Company, as shown by files in the office of the Secretary of State of Idaho personally at Pocatello Idaho in said District on the 16th day of December, A. D. 1938.

GEORGE A. MEFFAN
U. S. Marshal
By DAVE NICHOLS
Deputy

MARSHAL'S RETURN

United States of America,
District of Idaho—ss.

I hereby certify and return that I served the annexed Summons on the therein named Saint Paul Mercury Indemnity Company of St. Paul, a corp., by handing to and leaving a true and correct copy thereof with George W. Wedgewood, Commissioner of Finance of the State of Idaho and statutory agent for the Saint Paul Mercury Indemnity Co. of St. Paul, a corp., as shown by the files of the Secretary of State of Idaho at Boise, Idaho, in said District on the 19th day of December, A. D. 1938.

I further certify and return that I served the annexed Summons on the therein named Saint Paul Mercury Indemnity Company of St. Paul, a corp., by handing to and leaving a true and correct copy thereof with Oliver O. Haga, agent for said Saint Paul Mercury Indemnity Company of St. Paul, a corp., as shown by the records of the Clerk of the United States District Court, District of Idaho, personally at Boise, Idaho in said District on the 19th day of December, A. D. 1938.

Dated this 20th day of December, 1938.

GEORGE A. MEFFAN
United States Marshal
By JAMES W, AMES
Chief Deputy

RETURN ON SERVICE OF WRIT

United States of America,
District of Nebr.—ss.

I hereby certify and return that I served the annexed summons on the therein-named The Oregon Short Line Railroad Company, a corporation by handing to and leaving a true and correct copy thereof with William Jeffers, President personally at Union Pacific Bldg., 15th & Dodge, Omaha, in said District on the 4th day of January, A. D. 1939.

GEORGE E. PROUDFIT
U. S. Marshal
By JEROME A. LANGAN
Deputy

He being the highest officer of the said corporation found within my district.

[Endorsed]: Filed Jan. 6, 1939.

[Title of District Court and Cause.]

MOTION FOR MORE DEFINITE STATEMENT OR FOR BILL OF PARTICULARS

Comes now the defendant, Oregon Short Line Railroad Company, and demands and moves the court to require the plaintiff to furnish a more definite statement or bill of particulars, with respect to the complaint filed herein, in the following respects:

First: With respect to the funeral expenses, alleged in paragraph XIV of said complaint to have been incurred, amounting to approximately $2,500.00, to show by whom said expenses have been incurred, to whom incurred, and specifically and particularly for what items, material and service with respect to each of said deceased Indians.

Second: With respect to the item of $10,000.00 alleged in paragraph XIV of said complaint to be "due, owing and unpaid from the defendants to the plaintiff for the use and benefit of the Shoshone and Bannock tribes of Indians and the parties in interest", to show specifically for and on behalf of whom said sum is demanded, and (a) by what

factual process, and (b) upon what legal or rational basis, said demand of $10,000.00 is arrived at or demanded.

Said motion is based upon paragraph (e) of Rule 12 of the Rules of Civil Procedure for the District Courts of the United States, and the complaint filed herein.

GEO. H. SMITH
Address: Salt Lake City, Utah
H. B. THOMPSON (in person)
L. H. ANDERSON
Address: Pocatello, Idaho
Attorneys for Defendant, Oregon Short Line Railroad Company

Receipt, and service of copy, of the foregoing motion is hereby admitted this 31st day of December, 1938.

JOHN A. CARVER
E. H. CASTERLIN
FRANK GRIFFIN
Attorneys for Plaintiff

[Endorsed]: Filed Dec. 31, 1938.

[Title of District Court and Cause.]

MOTION FOR MORE DEFINITE STATEMENT OR FOR BILL OF PARTICULARS

Comes now the defendant, Saint Paul-Mercury Indemnity Company, of St. Paul, and demands and moves the court to require the plaintiff to furnish a

more definite statement or bill of particulars, with respect to the complaint filed herein, in the following respects:

First: With respect to the funeral expenses, alleged in paragraph XIV of said complaint to have been incurred, amounting to approximately $2,500.00, to show by whom said expenses have been incurred, to whom incurred, and specifically and particularly for what items, material and service with respect to each of said deceased Indians.

Second: With respect to the item of $10,000.00 alleged in paragraph XIV of said complaint to be "due, owing and unpaid from the defendants to the plaintiff for the use and benefit of the Shoshone and Bannock tribes of Indians and the parties in interest", to show specifically for and on behalf of whom said sum is demanded, and (a) by what factual process, and (b) upon what legal or rational basis, said demand of $10,000.00 is arrived at or demanded.

Said motion is based upon paragraph (e) of Rule 12 of the Rules of Civil Procedure for the District Courts of the United States, and the complaint filed herein.

GEO. H. SMITH
Address: Salt Lake City, Utah
H. B. THOMPSON
L. H. ANDERSON
Address: Pocatello, Idaho
Attorneys for Defendant: Saint Paul-Mercury Indemnity Company, of St. Paul

Receipt, and service of copy, of the foregoing motion is hereby admitted this 9 day of January, 1939.

JOHN A. CARVER
FRANK GRIFFIN
Attorneys for Plaintiff

[Endorsed]: Filed Jan. 9, 1939.

(MINUTES OF THE COURT)

[Title of Cause.]

Mar. 13, 1939

The defendants' motion for an order requiring a more definite statement and requiring the plaintiff to file a bill of particulars were argued before the court by H. B. Thompson, Esquire, on the part of the defendants and by Paul Boyd, Assistant District Attorney, on the part of the plaintiff.

The Court took the motions under advisement.

[Title of Cause.]

Mar. 14, 1939

The Court at this time announced his conclusions on the defendant's motion for a bill of particulars and motion to require a more definite statement, and denied the same.

[Title of District Court and Cause.]

ANSWER

Come now the defendants, and, for answer to the complaint filed herein, admit, deny and allege as follows:

First Defense

The complaint fails to state a claim against the defendants, or either of them, upon which relief can be granted.

Second Defense

I.

Admit the allegations contained in paragraphs I, II, III, IV, V and VI of said complaint.

II.

Deny each and every allegation contained and made in paragraph VII of said complaint.

III.

Answering paragraph VIII of said complaint, the defendants admit on June 5, 1888 a report was made to Congress by the Committee on Indian Affairs, copy of which said report is attached to the complaint filed herein marked Exhibit A and made a part thereof; and defendants admit that said report was made in connection with a proposal then pending before the said Congress of the United States to provide for a right of way for railroad purposes vesting in the predecessor of the defendant, Oregon Short Line Railroad Company, for a railroad operating in a general northerly and southerly direction across the Indian Reservation therein

mentioned. Defendants deny each and every other allegation *contaned* and made in paragraph VIII of said complaint.

IV.

Answering paragraph IX of said complaint, defendants admit that an agreement was made and entered into on the 27th day of May, 1887, between the United States of America and the Shoshone and Bannock tribes of Indians occupying the Fort Hall Indian Reservation in the Territory of Idaho, and that said agreement was ratified and embraced within an Act of Congress approved September 1, 1888, being 25 Stat. L. 452, which said Act of Congress contains, among other things, the portion thereof quoted in Paragraph IX of [14] said complaint. Defendants further admit that said Act of Congress was passed in furtherance of the purpose to permit and grant the right to the Utah and Northern Railway Company, its successors and assigns, to operate and maintain a line of railroad theretofore constructed over and across said Fort Hall Indian Reservation. Defendants deny each and every other allegation contained and made in paragraph IX of said complaint.

V.

Answering paragraph X of said complaint, defendants admit that the defendant, Oregon Short Line Railroad Company, is the successor in interest of the Utah and Northern Railway Company and that at all times material to this action has by reason of the terms of the treaty and agreement with the Indians and Act of Congress mentioned

in said complaint, operated and maintained a railroad system, running railroad engines, cars and trains across the Fort Hall Indian Reservation. Deny each and every allegation contained in paragraph X not hereinbefore expressly admitted.

VI.

Answering paragraph XI of said complaint, these defendants admit that pursuant to said Act of Congress approved September 1, 1888, mentioned in said complaint, but not otherwise, the defendants Oregon Short Line Railroad Company and Saint Paul-Mercury Indemnity Company, made, executed and delivered to the United States a bond as required by said Act of Congress in the words and figures set forth in paragraph XI of said complaint. The defendants deny each and every allegation contained and made in paragraph XI of said complaint not hereinbefore expressly admitted or denied.

VII.

Answering paragraph XII of said complaint, these defendants admit that by reason of said Act of Congress and said bond they became obligated according to the terms thereof to pay such legal damages as might accrue to the members of the Shoshone and Bannock tribes of Indians by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, in the construction and operation of said railway. Said defendants deny that by reason of said bond and the law applicable

thereto, or either thereof, they, or either of them, became liable or obligated to pay any sum on account of the killing or maiming of any Indian occurring [15] without the fault or negligence of the said Utah and Northern Railway Company or the defendant, Oregon Short Line Railroad Company, successor thereto, and deny each and every allegation contained and made in said complaint not hereinbefore expressly admitted or denied.

VIII.

Answering paragraph XIII of said complaint, defendants admit that on the 19th day of January, 1938, at a point where said railroad crosses what is known as the Fort Hall Agency road within the limits of the Fort Hall Indian Reservation, in Bingham County, State of Idaho, a locomotive engine owned and operated by the Union Pacific Railroad Company upon said line of railroad collided with an automobile occupied by Ira Ninnevoo, Esther Queep, Daisy Thomas and Genevieve Queep, and admit that said persons had a right to be on the Fort Hall Indian Reservation and upon said highway at the time of said collision. These defendants have not knowledge or information to form a belief as to whether either, all, or any of said Indians were members of the Shoshone and Bannock tribes of Indians, or either of said tribes, and upon that ground deny each and every of said allegations, and each and every allegation contained and made in said complaint not hereinbefore expressly admitted or denied.

IX.

Answering paragraph XIV of said complaint, the defendants admit that they have refused to make any settlement or pay any sum on account of the death or maiming of any of the Indians described in said complaint, but deny that any obligations were or have been incurred by these defendants, or either of them, under said bond and Act of Congress, or either thereof, on account of the death or injury to all or any of said Indians. The defendants admit that demand has been made upon them in the sum of $10,000.00 by the plaintiff herein; they deny that funeral expenses were incurred for the burial of the Indians that were killed amounting to the sum of $2,500.00, or any sum in excess of $500.00; they deny each and every other allegations contained and made in said paragraph XIV of said complaint not hereinbefore expressly admitted or denied, and deny each and every allegation contained and made in all or any part of said complaint not hereinbefore expressly admitted or denied. [16]

X.

Third Defense

Further answering said complaint, and as a third, separate and distinct defense thereto, these defendants allege that the plaintiff herein seeks recovery solely upon the statue, 25 Stat. L. 452, and the bond given pursuant thereto; that said statute does not CREATE a right of action for the death of a human being, or provide any measure of damages

therefor; that said statute is merely one providing for the giving of a bond to secure the payment to the United States, for the use and benefit of the Shoshone and Bannock tribes on the Fort Hall Indian Reservation of damages which may lawfully accrue to them in consequence of the violation of their legal rights by the Utah and Northern Railway Company, or by the Oregon Short Line Railroad Company, as its successor, and not otherwise; that the bond sued upon is not, and can not lawfully be held to be, broader than the statute, or to create a liability or obligation broader than that provided by statute, and that to render judgment in favor of the plaintiff and against the defendants, or either of them, would deprive these defendants, and each of them, of property without due process of law, contrary to and in violation of the provisions of the Fifth Amendment to the Constitution of the United States.

Wherefore, the defendants, and each of them, pray that the plaintiff take nothing by its complaint and that said defendants be hence dismissed with their just costs and disbursements herein incurred.

GEO. H. SMITH
Residing at: Salt Lake City, Utah.
L. H. ANDERSON
Residing at: Pocatello, Idaho.
H. B. THOMPSON
Subscribing Attorney—Residing at:
Pocatello, Idaho.

[Endorsed]: Filed March 21, 1939. [17]

[Title of District Court and Cause.]

MOTION TO STRIKE

Comes Now the United States of America, plaintiff in the above-entitled action, and moves to strike from the answer of the defendants, filed herein on March 21, 1939, all of that part thereof designated as a Third Defense on the ground and for the reason that the same, and all of the same, is redundant, immaterial and impertinent.

JOHN A. CARVER
U. S. Attorney for the District of Idaho
PAUL S. BOYD
Asst. U. S. Attorney for the District of Idaho.

[Endorsed]: Filed July 13, 1939. [18]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR JUDGMENT ON THE PLEADINGS AND ADMISSIONS OF PARTY.

To H. B. Thompson, L. H. Anderson and George H. Smith, Attorneys for the above named defendants.

Please Take Notice that upon the complaint and answer filed herein, the undersigned will move this Court, in the Federal Building, Boise, Idaho, on the 31st day of July, 1939, at ten o'clock in the forenoon

of that day, or as soon thereafter as counsel can be heard, for an order giving summary judgment to the plaintiff pursuant to Rule 56 of the Federal Rules of Civil Procedure, because the pleadings and the admissions of the defendants show that there is no genuine issue as to any material fact, except to the amount of damages due plaintiff, and that the moving party is entitled to a judgment as a matter of law, or for such other and further relief as the Court may deem just, with costs.

JOHN A. CARVER
U. S. Attorney for District of Idaho.
E. H. CASTERLIN
Ass't U. S. Attorney for the District of Idaho.
PAUL S. BOYD
Ass't U. S. Attorney for the District of Idaho.

[Endorsed]: Filed July 20, 1939. [18A]

(MINUTES OF THE COURT)
Jul. 31, 1939

[Title of Cause.]

The plaintiff's motion to strike the third defense of the defendants from the answer, and the motion for judgment on the pleadings were argued before the Court by Paul S. Boyd and E. H. Casterlin, Assistant District Attorneys, on the part of the plain-

tiff and by H. B. Thompson, Esquire, on the part of the defendants.

Counsel for the respective parties requested the Court to consider and pass upon the sufficiency of the first cause of action in the plaintiff's complaint.

The Court took the matters under advisement.

[18B]

[Title of District Court and Cause.]

OPINION

John A. Carver, United States District Attorney,
E. H. Casterlin, Assistant United States District Attorney
Paul S. Boyd, Assistant United States District Attorney
All of Boise, Idaho,
Attorneys for the Plaintiff.

George H. Smith, Salt Lake City, Utah
H. B. Thompson, Pocatello, Idaho.
L. H. Anderson, Pocatello, Idaho.
Attorneys for the Defendants.

August 3, 1939

Cavanah, District Judge.

The United States brings this suit to recover the sum of $10,000.00 for the use and benefit of the Shoshone and Bannock tribes of Indians as damages claimed to have accrued by reason of the killing or maiming of certain Indians belonging to the tribes on the Fort Hall Reservation, and predicates its

right to recover on Section 14, Chapter 936, 25 Stat. at large, approved September 1, 1888, and a bond given thereunder.

The defendants by their answer assert, first; that the complaint fails to state a claim against either of them upon which relief can be granted, and thereby presents the primary question arising for decision, of whether the defendants are liable where the complaint does not allege, nor the Statute and bond contain a provision that the defendant Railroad Company was negligent or at fault at the time of the accident.

The provision of the Statute provides: "Sec. 14. That said railway Company shall execute a bond [19] to the United States, to be filed with and approved by the Secretary of the Interior, in the penal sum of ten thousand dollars, for the use and benefit of the Shoshone and Bannack tribes of Indians, conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian, belonging to said tribes, or either of them, or of their live-stock, in the construction or operation of said railway, or by reason of fires originating thereby; the damages in all cases, in the event of failure by the railway company to effect an amicable settlement with the parties in interest, to be recovered in any Court of the Territory of Idaho having jurisdiction of the amount claimed, upon suit or action instituted by the proper United States Attorney in the name of the United States: Provided, that all moneys so recovered by

the United States Attorney under the provisions of this section, shall be covered into the Treasury of the United States, to be placed to the Credit of the particular Indian or Indians entitled to the same, and to be paid to him or them, or otherwise expended for his or their benefit, under the direction of the Secretary of the Interior."

And the provisions of the bond provides: "Whereas, Section 14 of said Act requires that the company shall execute a bond to the United States, to be filed with and approved by the Secretary of the Interior, in the penal sum of $10,000. for the use and benefit of the Shoshone and Bannock tribes of Indians, conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, or of their livestock, in the construction or operation of said railway, or by reason of fires originating thereby;"

"Now Therefore, if the said Oregon Short Line Railroad Company, its successors or assigns, shall make full satisfaction for any and all such deaths, injuries, [20] or damages, then this obligation shall be null and void; otherwise, to remain in full force and effect."

It will be observed that the language of the statute limits the liability "for due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian." And the conditions of the bond are identical with the terms of the Statute, making the obligation of the bond for the

payment of "damages which may accrue by reason of the killing or maiming of any Indian," and does not provide that the killing must be by reason of the negligence or wrongful acts of the Railroad Company. Then what was the intention of Congress in using the words "damages which may accrue by reason of the killing or maiming of any Indian"? If the language used expresses the intention, reasonably intelligent and plain, the Court must accept it without modification by resorting to conjecture or construction. Congress must be presumed to use words in their ordinary and known signification; Thompson v. U. S. 246 U. S. 547; Old Colony R. Co., v. Comm's 284 U. S. 552-560. What then do the words, "damages which may accrue by reason of killing or maiming of any Indian" mean or convey? Accrue as that phrase is used by the Courts when in speaking of a cause of action is, at a time which an enforceable legal right arises. It is the possession of an enforceable legal right. United States ex rel. Louisville Cement Company v. Interstate Commerce Commission, 246 U. S. 638. The statute seems clear in granting to the United States the right to seek a recovery at the time of the killing of the Indians, and Congress had the power to require the railroad company to execute a bond to indemnify securing payment to the United States "conditioned for the due payment of any damages which may accrue by reason of the killing or maiming of any Indian", and when it did so, the inquiry then arises; can it make the railroad

company liable in all instances regardless of whether [21] it was negligent or its acts wrongful? We are now considering a statutory liability upon which the bond is based, and from it the right is granted to recover damages which may accrue, meaning an enforceable legal right. Then what constitutes a legal right, is it one granting to one the right to recover damages although the one sued be not negligent or at fault, or can it be reasoned that it would be a right not based upon a wrongful act or negligence of another? The term legal is that authorized by law; the observance of the forms of law, and the act is one rightful in substance, and moral quality is observed. Should the statute be construed as excluding the right to assert that the railroad Company was not negligent or at fault, and that the proximate cause of the injury was due to the negligence of the deceased Indians, it would be ignoring the definition of the term legal, which requires the act complained of to be one rightful in substance. It would not be rightful for one to recover damages if the proximate cause of the injury was due by reason of his own fault, and not the negligence or wrongful act of the one sued.

If Congress intended to exclude the right of defense of lack of negligence or wrongful act by the railway company or that the Indians may have been guilty of contributory negligence, it would have done so by inserting such words in the Statute. The Statute does nothing more than grant the right

for the payment of damages which may accrue by reason of the killing or maiming of an Indian, and does not exclude a consideration of the circumstances under which the accident occurred. General terms in a statute should be so limited in their application as not to lead to injustice. White v. Hopkins, 51 Fed. (2) 162. There are many statutes couched in general terms recognizing the right to recover, such as the possession of real and personal property, debt, conversion, libel, damages etc., yet because they are, does not deny the defense of reviewing [22] the circumstances under which the act complained of occurred or that the plaintiff may have been, by reason of some act of his, negligent or at fault preceding or at the time of the occurrence. The construction here given to the Statute is not reading into it or deducting from it any words, only giving the same construction as is given to similar statutes phrased in general terms.

Although no doubt exists as to the thought thus expressed being the correct construction of the terms of the Statute, the Statute will not be construed as taking away a common law right unless such common law right is, by express words, embodied in the Statute, and Courts will be reluctant to construe such a Statute in derogation of the common law. Globe & Rutgers Fire Insurance Co., v. Draper (9th C) 66 Fed. (2) 985. The expression in the Statute "in the event of failure by the Railway Company to effect an amicable settlement with

the parties in interest'', clearly indicates that Congress intended that the Railway Company and the parties had the right to consider how the injury occurred, and not that the plaintiff could assert unconditional liability.

Stress is made that by reason of the treaties with the Indians and the committees' report prior to the enactment of the Statute, Congress intended to make it an UNCONDITIONAL LIABILITY in the event an Indian is killed or maimed by a railway company, but Congress has not done so by the terms of the Statute, which it had the power to enact, and has not by it taken away the common law right to assert lack of negligence or wrongful act or fault of the railway company or contributory negligence of the Indian. The Committee's report is only considered to solve a doubt and not where the language of the Statute is clear. The mere fact that the deceased were Indians would not warrant an interpretation of the Statute which conflicts with the acknowledged principles of justice where it is commonly [23] known that the Indians, a large number of which own and operate automobiles and are capable of driving them. To interpret as imposing absolute liability where the Statute only implies nothing more than the giving of a bond to pay accrued damages based upon a liability of a Statute not prohibiting a defense at common law and to deny an opportunity to be heard with respect to the negligence or fault of the railroad com-

pany or that the Indians were at fault does not provide "due process of law" provided for in the Constitution and in derogation of the common law. The Supreme Court of the State has clearly reached this conclusion when in considering a statute similar to the one in question. Castril v. Union Pacific Railway Company, 2 Idaho 576; 21 Pac. 416.

The railroad company was required under the Statute to pay to the United States $8.00 per acre for its right of way of 200 feet in width through the reservation in the operation of its road, to be used for the benefit and support of the Indians, which removes any impression that the railway company had secured its right-of-way free.

In view of the conclusions thus reached, that the complaint does not state facts sufficient to constitute a cause of action, the first ground of defense appearing in the answer is sustained and the motions of the plaintiff to strike, and for summary Judgment is denied.

[Endorsed]: Filed August 4, 1939. [24]

[Title of District Court and Cause.]

ORDER

In harmony with written memorandum opinion filed on this date, in the above entitled cause, it is Ordered that the defense of the defendants, that the complaint does not state a claim against either of them upon which relief can be granted is sus-

tained, and the motions of the plaintiff to strike and for judgment on the pleadings are denied.

Dated August 4, 1939.

CHARLES C. CAVANAH
United States District Judge.

[Endorsed]: Filed Aug. 4, 1939. [24A]

[Title of District Court and Cause.]

AMENDED ORDER

In harmony with written memorandum opinion filed on the 4th day of August 1939, in the above entitled cause, it is Ordered that the defense of the defendants that the complaint does not state a claim against either of them upon which relief can be granted is sustained, and the motions of the plaintiff to strike and for a summary judgment are denied.

Dated August 5th, 1939.

CHARLES C. CAVANAH
United States District Judge.

[Endorsed]: Filed August 5, 1939. [25]

[Title of District Court and Cause.]

JUDGMENT

An amended order having been made herein on the 5th day of August, 1939, by which it was or-

dered that the defense of the defendants that the complaint did not state a claim against either of them upon which relief could be granted was sustained, and the motions of the plaintiff to strike and for summary judgment were denied, and the plaintiff having elected not to proceed further but to stand upon said complaint, and the time for said plaintiff to so further plead having expired, now, therefore,

It Is Ordered and adjudged that said complaint be and the same hereby is dismissed.

Dated, September 19th, 1939.

CHARLES C. CAVANAH
United States District Judge.

[Endorsed]: Filed September 19, 1939. [26]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, the above named plaintiff, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain judgment dismissing plaintiff's complaint made and entered in this action on September 19, 1939, and from the whole thereof.

Dated this 9th day of December, 1939.

JOHN A. CARVER
United States Attorney for the District of Idaho
E. H. CASTERLIN
Assistant U.S. Attorney for the District of Idaho
PAUL S. BOYD
Assistant U. S. Attorney for the District of Idaho
Attorneys for Plaintiff.

(Copy of Notice of Appeal mailed to H. B. Thompson, of counsel for Defendants, on December 9, 1939 by Clerk)

[Endorsed]: Filed December 9, 1939. [27]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK OF UNITED STATES DISTRICT COURT TO TRANSCRIPT OF RECORD

United States of America,
District of Idaho—ss.

I, W. D. McReynolds, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages numbered 1 to 33 inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to

the hearing of the appeal therein in the United States Circuit Court, in accord with designations of contents of record on appeal of the appellant and appellees, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of $5.10, and that the same have been paid in full by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 18th day of December, 1939.

[Seal] W. D. McREYNOLDS,
Clerk.

United States of America,
District of Idaho—ss.

I, W. D. McReynolds, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing copy of:

1. Exhibit "A" attached to the complaint
2. Motion for More Definite Statement or for Bill of Particulars, filed Dec. 31, 1938
3. Summons together with returns thereon
4. Motion for more definite Statement or for Bill of Particulars, filed Jan. 9, 1939

5. Minutes of the Court, Mar. 13, 1939
6. Minutes of the Court, Mar. 14, 1939
7. Motion to Strike, filed July 13, 1939
8. Notice of Motion for Judgment on the Pleadings and Admissions of Party
9. Minutes of the Court, July 31, 1939
10. Order, filed Aug. 4, 1939
11. Appellees' Designation of Contents of Record on Appeal

Filed in the Case of United States of America, vs. The Oregon Short Line Railroad Company, a corporation, et al, No. 1069, Eastern Division, have been by me compared with the originals and that they are correct transcripts therefrom and of the whole of such originals as the same appear of record and on file in my office and in my custody.

I further certify that the above listed papers constitute all papers which have been filed in the said cause, and not included in the certified transcript on appeal of said cause to the United States Circuit Court of Appeals for the Ninth Circuit.

In Testimony Whereof, I have set my hand and affixed the seal of said Court in said District this 29th day of December, 1939.

[Seal] W. D. McREYNOLDS,

Clerk

By ETHEL HOUSE

Deputy

[Endorsed]: No. 9403. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. The Oregon Short Line Railroad Company, a corporation, and Saint Paul-Mercury Indemnity Company of St. Paul, a corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Idaho, Eastern Division.

Filed December 22, 1939.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit

No. 9403

UNITED STATES OF AMERICA,
Appellant,

vs.

THE OREGON SHORT LINE RAILROAD COMPANY, a corporation, and ST. PAUL-MERCURY INDEMNITY COMPANY OF ST. PAUL, a corporation,
Appellees.

STATEMENT OF POINTS ON WHICH THE APPELLANT, UNITED STATES OF AMERICA, INTENDS TO RELY ON APPEAL, AND DESIGNATION OF RECORD.

Comes now the appellant, the United States of America, by its undersigned solicitors and respect-

fully represents to this Honorable Court that in the above styled and numbered cause it intends to rely upon the following statement of points on appeal:

I.

That the Act of September 1, 1888, c. 936, 25 Stat. 452, imposes absolute liability upon the railroad company to pay for damages caused by the operation of the railroad without regard to negligence.

II.

If the statute is construed to impose absolute liability on the railroad, under the circumstances of this case the railroad cannot assert unconstitutionality of the statute at this time.

III.

Assuming the railroad could inquire into the constitutionality of the Act of September 1, 1888, that statute when so construed is constitutional and does not violate the "due process clause" of the Fifth Amendment of the Constitution of the United States.

The appellants deem the entire record as filed to be necessary for the consideration of the contentions above enumerated.

Dated this 3rd day of January, 1940.

Respectfully submitted,

JOHN A. CARVER
United States Attorney for the District of Idaho.

E. H. CASTERLIN
Assistant United States Attorney for the District of Idaho.

PAUL S. BOYD
Assistant United States Attorney for the District of Idaho.

Service of the foregoing and receipt of copy this 6th day of January, 1940, is hereby acknowledged.

GEO. H. SMITH
H. B. THOMPSON
L. H. ANDERSON
Attorneys for Appellees

[Endorsed]: Filed Jan. 10, 1940. Paul P. O'Brien, Clerk.

No. 9403

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

THE OREGON SHORTLINE RAILROAD COMPANY, A CORPORATION, AND SAINT PAUL-MERCURY INDEMNITY COMPANY OF ST. PAUL, A CORPORATION, APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO, EASTERN DIVISION

BRIEF FOR THE UNITED STATES

NORMAN M. LITTELL,
Assistant Attorney General.
JOHN A. CARVER,
United States Attorney, District of Idaho.
CHARLES R. DENNY,
EDWARD H. HICKEY,
Attorneys, Department of Justice, Washington, D. C.

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CITATIONS

211895—40——1

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 9403

UNITED STATES OF AMERICA, APPELLANT

v.

THE OREGON SHORTLINE RAILROAD COMPANY, A CORPORATION, AND SAINT PAUL-MERCURY INDEMNITY COMPANY OF ST. PAUL, A CORPORATION, APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO, EASTERN DIVISION

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court is not reported but may be found in the record at pages 36–43.

JURISDICTION

This suit was instituted by the United States on behalf of the Shoshone and Bannack tribes of Indians under authority of the Act of September 1, 1888, c. 936, 25 Stat. 452, and jurisdiction of the district court was invoked under section 14 of that act (R. 3). The judgment of the district court dismissing the complaint was entered September 19, 1939 (R. 44–45). Notice of ap-

peal was filed December 9, 1939 (R. 45–46). The jurisdiction of this Court is invoked under section 128 of the Judicial Code, as amended, 28 U. S. C., sec. 225 (a).

QUESTIONS PRESENTED

The Act of September 1, 1888, c. 936, 25 Stat. 452, granted the defendant railroad a right of way through an Indian reservation and required the railroad to "execute a bond to the United States * * * in the penal sum of ten thousand dollars, for the use and benefit of the Shoshone and Bannack tribes of Indians, conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes."

The questions presented are (1) whether the Act imposes absolute liability upon the railroad to pay for damages caused by the operation of trains through the reservation without regard to negligence, and (2) whether the Act, if construed as imposing absolute liability, is constitutional.

STATUTE INVOLVED

The pertinent provision of the act of September 1, 1888, c. 936, sec. 14, 25 Stat. 452, is set forth in the statement at page 4, *infra*.

STATEMENT

The United States, on behalf of the Shoshone and Bannack tribes of Indians, brought this suit pursuant to section 14 of the Act of September 1, 1888, c. 936, 25 Stat. 452, and on a bond given thereunder, to recover damages in the sum of $10,000 for the killing and maiming of four Indians (R. 2–20).

On January 19, 1938, at a railroad crossing within the Fort Hall Indian Reservation, a train operated by the defendant railroad collided with an automobile occupied by four Indians of the Shoshone and Bannack tribes (R. 11). Three of the Indians were killed and the fourth was injured (R. 12). This suit was filed after both the defendant railroad and the surety on its bond failed to pay the damages upon demand (R. 12). The following background is necessary for an understanding of the issues here presented:

The Fort Hall Indian Reservation was established for the Shoshone and Bannack tribes of Indians by the Treaty of July 3, 1868, 15 Stat. 673. This treaty provides in part:

> And the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians * * *.

Neither the Oregon Shortline Railroad Company nor its predecessor, the Utah & Northern Railway Company, was one of the persons authorized to go upon the lands designated by the treaty (R. 4–5). Nevertheless, the Utah & Northern Railway Company constructed its line through the Fort Hall Indian Reservation without having first obtained a right of way.

To adjust the rights of the tribe and to enable the railroad company to acquire the necessary right of way

through the reservation, the United States and the Shoshone and Bannack tribes entered into an agreement which was accepted and ratified by Congress by the Act of September 1, 1888, c. 936, 25 Stat. 452. Section 14 of the Act provides:

> That said railway company shall execute a bond to the United States, to be filed with and approved by the Secretary of the Interior, in the penal sum of ten thousand dollars, for the use and benefit of the Shoshone and Bannack Tribes of Indians, conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, or of their livestock, in the construction and operation of said railway, or by reason of fires originating thereby; the damages in all cases, in the event of failure by the railway company to effect amicable settlement with the parties in interest, to be recovered in any court of the Territory of Idaho having jurisdiction of the amount claimed, upon suit or action instituted by the proper United States attorney in the name of the United States: *Provided,* That all moneys so recovered by the United States attorney under the provisions of this section shall be covered into the Treasury of the United States, to be placed to the credit of the particular Indian or Indians entitled to the same, and to be paid to him or them, or otherwise expended for his or their benefit, under the direction of the Secretary of the Interior.

The Oregon Shortline Railroad Company and St. Paul-Mercury Indemnity Company executed a bond as contemplated by the foregoing section (R. 8–10). The

bond recites the statutory grant of the right of way and the pertinent part of the above mentioned section 14 and further provides,

> Now, therefore, if the said Oregon Shortline Railroad Company, its successors or assigns, shall make full satisfaction for any and all such deaths, injuries, or damages, then this obligation shall be null and void; otherwise to remain in full force and effect (R. 9).

All of the foregoing facts are set out in the complaint filed by the United States. Defendants' motions for a more definite statement or for a bill of particulars, were denied by the court (R. 27). Thereafter, defendants filed an answer setting up three defenses: (1) that the complaint fails to state a claim upon which relief can be granted; (2) a general denial of liability; and (3) a denial that the statute and bond created a right of action and further, to render judgment would deprive the defendants of property without due process of law (R. 28–33).

The United States took the position that under the statute and the bond given pursuant thereto the liability of the defendants was absolute. Accordingly, it filed a motion to strike the third defense (R. 34) and moved for summary judgment on the complaint (R. 34–35). Both motions were denied (R. 44). The United States elected to stand upon its complaint and declined to plead further (R. 45).

On September 19, 1939, the court entered judgment in favor of the defendants, dismissing the complaint on the ground that it did not state a claim upon which relief could be granted (R. 44–45).

STATEMENT OF POINTS RELIED UPON

I

That the Act of September 1, 1888, c. 936, 25 Stat. 452, imposes absolute liability upon the railroad company to pay for damages caused by the operation of the railroad without regard to negligence.

II

If the statute is construed to impose absolute liability on the railroad, under the circumstances of this case the railroad cannot assert unconstitutionality of the statute at this time.

III

Assuming the railroad could inquire into the constitutionality of the Act of September 1, 1888, that statute when so construed is constitutional and does not violate the due process clause of the Fifth Amendment of the Constitution of the United States.

ARGUMENT

I

The Act of September 1, 1888, imposes absolute liability for damages caused by the operation of the railroad

A. It is clear from the language of the Act that Congress imposed absolute liability

It is plain from a reading of section 14 that Congress intended to make the company and its surety responsible for damages resulting from the operation of the railroad through the Indian reservation irrespective of negligence. The section expressly states:

> That said railway company shall execute a bond to the United States, to be filed with and approved by the Secretary of the Interior, in the

> penal sum of ten thousand dollars, for the use and benefit of the Shoshone and Bannack tribes of Indians, conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, or of their live-stock, in the construction and operation of said railway, or by reason of fires originating thereby; * * *

There is no indication that the damages to be recovered must result from the *negligent* operation of the railroad. The language of the section admits of no such qualification. On the contrary, the clear and unequivocal language used by Congress indicates an intention to impose liability irrespective of negligence.

The district court reached a contrary result by an involved process of reasoning which, in effect, was a rewriting of the statute. It took the phrase "damages which may accrue" and immediately cast aside the word "damages" which Congress had used and substituted "cause of action" saying (R. 39),

> Accrue as that phrase is used by the Courts when in speaking of a *cause of action* is, at a time which an enforceable *legal right* arises. [Italics supplied.]

The court then took the words "legal right" which it had thus read into the statute and construed them as follows (R. 40):

> Then what constitutes a *legal right,* is it one granting to one the right to recover damages although the one sued be not negligent or at fault, or can it be reasoned that it would be a right not

> based upon a wrongful act or negligence of another? The term *legal* is that authorized by law; the observance of the forms of the law, and the act is one rightful in substance, and moral quality is observed. Should the statute be construed as excluding the right to assert that the railroad company was not negligent or at fault, * * * *it would be ignoring the definition of the term legal,* which requires the act complained of to be one rightful in substance. [Italics supplied.]

In short, the district court inserted new words in the statute and then decided that the words which it had added necessitated the conclusion that the railroad was liable only if negligent.

It is submitted that the court's interpretation is completely unwarranted. No such narrow distinction can be applied to the words used in the provision. By attaching an unduly technical and restricted meaning to the word "accrue" the court read into the statute a requirement that Congress never intended should exist.

Although the district court did not apply the rule its opinion recognizes that it is a cardinal principle of statutory construction that "Congress must be presumed to use words in their ordinary and known signification" (R. 39). The statute contains no indication to the contrary. This Court has defined the word "accrue" as follows:

> To grow to; to be added to; to become a present right or demand * * * To rise, to happen, to come to pass * * *.
> As a general statement, the word "arose" seems most expressive. * * * *H. Liebes & Co.* v.

Commissioner of Internal Revenue, 90 F. 2d 932, 936, C. C. A. 9 (1937).

Thus, the appellees were to be liable for any and all damages that *arose* "by reason of the killing or maiming of any Indian belonging to said tribes, or either of them * * * in the construction and operation of said railway." This, the United States contends, is the plain meaning of the statute.

B. If any doubt exists as to the meaning of section 14 it must be resolved in favor of the Indians and the United States

The district court approached the question at issue as if only a general statute regulating railroad liability were involved. Compare *Castril* v. *Union Pac. Ry. Co.,* 2 Idaho 576, 21 Pac. 416 (1889), upon which it relied (R. 43). It stated that the statute should be strictly construed as it was in derogation of common law (R. 41). There are two reasons why such a principle can have no application here.

In the first place, the provision in question is for the benefit of the Indians. Such statutes are to be liberally construed, all doubts to be resolved in favor of the Indians. *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, 89 (1918); *Choate* v. *Trapp,* 224 U. S. 665, 675 (1912).

Secondly, the Act of September 1, 1888, is properly to be given effect both as a law and as a conveyance. Section 11 of that Act, in addition to granting to the railroad company a right of way through the reservation, also conveyed parcels of land along the line to be used for stations and other purposes. Section 14 was a further provision of the grant between the United States and the Indian tribes on one side and the rail-

road on the other. In the interpretation of such a provision, rules which would ordinarily control the construction of general statutes regulating railroad liability do not apply. For it is well established that a grant by the United States is to be strictly construed against the grantee. Black, Interpretation of Laws (1896) pp. 315–316. As stated by the Supreme Court in *Hannibal &c. Railroad Co.* v. *Packet Co.,* 125 U. S. 260, 271 (1888):

> But if there be any doubt as to the proper construction of this statute (and we think there is none), then that construction must be adopted which is most advantageous to the interests of the government. The statute being a grant of a privilege, must be construed most strongly in favor of the grantor.

C. The circumstances surrounding the passage of the Act indicate that the purpose of section 14 was to require the railroad to assume the risk of all losses as to life and property of the Indians which should result from the operation of the railroad through the reservation

In the absence of section 14 the company would be liable for loss of life and property of the Indians occasioned by the negligent operation of the railroad. In the final analysis, therefore, the decision of the district court means that the Indians bargained only for a bond in the amount of $10,000 to which they could resort when the railroad was liable by reason of negligence and failed to pay. Surely, it is not to be supposed that this was all that was sought by section 14. On the contrary, there are ample reasons to believe that the United States and the Indians sought and the railroad understood that it was to assume a larger responsibility.

1. When the United States and the Indians made an agreement to grant a right of way to the railway company, it must have been evident that in the operation of the railroad through the reservation there would be losses of the character described in section 14, even in the absence of negligence on the part of the railroad. Unless provision was made for the company to assume the risks of such losses the tribes or the United States as their guardian would have to bear them. That section 14 was agreed upon in order to shift the burden to the railroad would seem clearly to be the case. There was ample precedent for so doing.

For years prior to the enactment of this section legislation was in force in most of the states imposing absolute liability on railroads for damages resulting from fire. See *St. Louis & San Francisco R'y* v. *Mathews,* 165 U. S. 1 (1897), containing an historic treatment and summary of the various statutes then in effect. In addition, many states had also imposed liability irrespective of negligence for damages done by railroads to livestock along their rights of way. See *Missouri Pacific Railway Co.* v. *Humes,* 115 U. S. 512 (1885).[1]

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[1] Other instances reflecting legislative policy of absolute liability may be found in various fields. Railroads have been made liable without fault for injuries to passengers. *Chicago, R. I. & P'y. Co.* v. *Zernecke*, 183 U. S. 582 (1902). A driver of animals has been declared liable for injury to the highway, though guilty of no negligence. *Jones* v. *Brim*, 165 U. S. 180 (1897). Absolute liability has been imposed upon municipalities for injuries done by mobs within their borders. *Chicago* v. *Sturges*, 222 U. S. 313 (1911). Liability, irrespective of fault, has been imposed upon employers for the injury or death of employees occuring in the employment. *N. Y. Central R. R. Co.* v. *White*, 243 U. S. 188 (1917).

The considerations of public policy which have prompted legislation imposing absolute liability are summarized in *Martin* v. *New York & New England R. R. Co.*, 62 Conn. 331, 25 Atl. 239, 240 (1892):

> The reasons underlying this legislation are not hard to find. The railroad companies were in possession of great powers and privileges granted by the state. The use of such powers was necessarily attended with danger to property along the line of the road, and fires were of frequent occurrence. The legislature rightly judged that it was hard for individuals to bear all these losses, and that the railroad companies might well be required to make them good. Nor is such a requirement unjust. On the contrary it is substantially right and just. Railroad companies possess extensive powers and valuable franchises, by means of which they are able to collect large sums of money from the public. In using such powers and franchises they necessarily expose private property. They have a license from the public to carry on extensively a dangerous business, from which they receive large profits. Why should they not be required to assume the risk rather than individuals?

In view of the well established state legislative policy, it is difficult to suppose that Congress did not intend to protect the Indians in at least as effective a manner, particularly where no statute existed in the Territory of Idaho imposing absolute liability on the railroad, even as to damages caused by fire.

2. Cast in the setting of a prior grant, section 14 can be seen to be part of a legislative pattern of protection formulated by Congress on behalf of the Shoshone and

Bannack Tribes. In an earlier grant of a right of way on the same reservation to the same railroad, the United States and the tribe had required the railroad to assume the risk of all losses to Indian life and property, regardless of the railroad's freedom from negligence, and made failure to observe this requirement a condition for forfeiture of the grant. Act of July 3, 1882, c. 268, 22 Stat. 148. Section 3 of this act provided:

> Nor shall said land, or any part thereof, be continued to be used for railroad purposes by or for said Utah and Northern Railroad Company, its successors or assigns, except upon the further condition that said company, its successors or assigns, will pay any and all damages which the United States or said Indians, individually or in their tribal capacity, or any other Indians lawfully occupying said reservation, may sustain by reason or on account of the act or acts of said company, its successor or assigns, its agents or employees, or on account of fires originating by or in the construction or operation of such railroad, the damages in all cases to be recovered in any court in the Territory of Idaho having jurisdiction of the amount claimed, upon suit or action instituted by the proper United States Attorney in the name of the United States. * * *.[2]

In short, under the 1882 Act which granted a right of way running east and west the railroad was to pay

[2] Referring to this provision the House Committee on Indian Affairs in its report recommending the passage of the bill said, "It also provides that the company shall be liable for damages to the United States, or to the Indians, collectively or individually, that may be sustained by the acts of the company, its agents, or employees." H. Rept. No. 659, 47th Cong., 1st sess., p. 2.

any and all damages sustained "by reason or on account of the act or acts of said company," without qualification.

It is submitted that section 14 of the 1888 Act granting a right of way extending north and south contemplated the assumption of a similar obligation by the railroad.

To hold otherwise would result in the creation of an anomalous situation whereby one part of the railroad running east and west becomes absolutely liable for damages caused in its operation, while the other line running north and south is subject to liability only in the event of negligence.

3. It was an important purpose of the United States to protect every possible interest of the Indians. In the report of the House Committee on Indian Affairs, it was stated (R. 20):

> Provision is made for indemnification by the railway company to the Indians for killing or maiming the Indians or their stock; also for fencing in the railway track where it runs through improved lands of the Indians. *We believe, in short, that every interest of the Indians has been jealously guarded and protected.* [Italics supplied.]

When it is considered that at the time of the grant, the reservation was occupied by a nomadic and uncivilized people helplessly at the mercy of the railroad and unable to bear the loss themselves, it was natural for Congress to insert in the act a provision designed to protect them from the dangers of such an instrumentality. Certainly a provision for a $10,000 bond for

damages caused by the negligence of the railroad is hardly "jealous" protection of "every interest" of the Indians.

II

The imposition of absolute liability upon the railroad is constitutional

The appellees contended (R. 33) and the district court apparently took the view (R. 42–43) that the Act of 1888 would not be constitutional if it were construed as imposing absolute liability upon the railroad. It is submitted, however, that refusal to construe the statute broadly may not be grounded on the theory that the railroad would otherwise be deprived of property without due process of law.

The Government, of course, does not concede that the appellees are in a position to challenge the constitutionality of the statute. The railroad has accepted the benefits of the grant both by agreement with the Indians and the United States and by its subsequent acts in constructing and operating its line through the reservation. Having accepted the benefits, the company and its surety are estopped from repudiating the burdens attached. *Daniels* v. *Tearney,* 102 U. S. 415, 421 (1880); *Chicago, R. I. & R'y. Co.* v. *Zernecke,* 183 U. S. 582, 588 (1902); *Grand Rapids & Indiana Ry. Co.* v. *Osborn,* 193 U. S. 17, 29 (1904); *Booth Fisheries* v. *Industrial Comm.,* 271 U. S. 208, 211 (1926); *Wall* v. *Parrott Silver & Copper Co.*, 244 U. S. 407, 411 (1917). The constitutionality of an imposition of absolute liability is discussed at this time solely for what bearing it may have on the proper construction of the Act. The

Government contends that no doubt would be cast upon the validity of the Act by adopting the construction it advocates.

Because the United States could have withheld from the railroad the privilege of running its trains over the Indian reservation, it is clear that it could condition the grant of this privilege on the railroad's foregoing a constitutional right on the theory that the greater power includes the lesser. *Davis* v. *Massachusetts,* 167 U. S. 43 (1896); *Atkin* v. *Kansas,* 191 U. S. 207 (1903); *Ellis* v. *United States,* 206 U. S. 246 (1907); *Heim* v. *McCall,* 239 U. S. 175 (1915); *Packard* v. *Banton,* 264 U. S. 140 (1923); *Fox River Co.* v. *R. R. Comm.,* 274 U. S. 651 (1926); *Hodge Co.* v. *Cincinnati,* 284 U. S. 335 (1931); *Stephenson* v. *Benford,* 287 U. S. 251 (1932).

Illustrative of this principle is the holding in *Fox River Co.* v. *Railroad Commission, supra.* In that case the Supreme Court held that a state statute which required a riparian owner to promise, as a condition precedent to his right to build a dam, that he would sell the dam to the state after 30 years, waiving all right to compensation in excess of replacement cost, did not deprive him of property without due process of law. The Court stated (p. 657) that compliance with the statute was the "price which plaintiffs must pay to secure the right to maintain their dam."

Applying this principle to the present case, it is plain that the Federal Government may demand of the railroad that it bear the burden of absolute liability as part of the price to be paid for the right to construct, maintain, and operate its road through the Fort Hall Indian Reservation.

CONCLUSION

It is submitted that the judgment of the district court should be reversed.

Respectfully.

NORMAN M. LITTELL,
Assistant Attorney General.
JOHN A. CARVER,
United States Attorney, District of Idaho.
CHARLES R. DENNY,
EDWARD H. HICKEY,
Attorneys, Department of Justice, Washington, D. C.

U. S. GOVERNMENT PRINTING OFFICE: 1940

No. 9403

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Apellant,

vs.

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Appellees.

BRIEF FOR APPELLEES

Appeal from the District Court of the United States for the District of Idaho, Eastern Division.

GEORGE H. SMITH,
Salt Lake City, Utah.

H. B. THOMPSON,
L. H. ANDERSON,
Pocatello, Idaho.

Attorneys for Appellees.

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L. H. ANDERSON,
Pocatello, Idaho.

Attorneys for Appellees.

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BRIEF FOR APPELLEES

OPINION BELOW

The opinion of the District Court is not reported but may be found in the record at pages 36-43.

JURISDICTION

This suit was instituted by the United States on behalf of the Shoshone and Bannock tribes of Indians under authority of the Act of September 1, 1888, c. 936, 25 Stat. 452, and jurisdiction of the District Court was invoked under section 14 of that act (R. 3). The judgment of the District Court dismissing the complaint was entered September 19, 1939 (R. 44-45). Notice of appeal was filed December 9, 1939 (R. 45-46). The jurisdiction of this Court is invoked under section 128 of the Judicial Code, as amended, 28 U. S. C., sec. 225 (a).

QUESTIONS PRESENTED

1. Whether, under act of Congress of September 1, 1888, 25 Stat. 452, confirming a treaty with the Shoshone and Bannock tribes of Indians for the relinquishment by them of a railroad right of way 200 feet wide in consideration of the payment of $8.00 per acre therefor, and a bond given pursuant to such act of Congress conditioned for the due payment of any and all damages which might accrue to the Indians, the railroad company and its surety were liable for the death of an Indian within the limits of the reservation in consequence of having been struck by a railroad train but without negligence on the part of the railroad company.

2. Whether the act, if construed as imposing unconditional liability, infringes the rights guaranteed to the appellees under the Fifth Amendment to the Constitution of the United States.

STATUTES INVOLVED

Section 14 of 25 Stat. 452 is set forth at page 4 of the appellant's brief.

The treaty with the Indians upon which the statute was based, and the portion of the statute granting the right of way, are set forth in the appendix hereto, pp. 28-31.

STATEMENT OF THE CASE

This is an action to recover $10,000.00 on a bond given by the Oregon Short Line Railroad Company to secure the payment of "all damages which may accrue" on account of the killing or maiming of certain Indians, and their livestock, on the Fort Hall Reservation, in southern Idaho. So far as the right to the collection of damages is concerned, all that is

alleged in the complaint is that on May 27, 1887, the Fort Hall and Bannock Indians made a memorandum of agreement with the United States for the relinquishment and sale, for the sum of $8.00 per acre, to the Utah and Northern Railroad Company of a right of way 200 feet wide, upon which railroad tracks had been constructed, which agreement is not set forth nor its limits expressed in the complaint (R. 6, 19). The complaint further alleges the enactment of a law ratifying the agreement, which also provided that the railroad company should execute a bond in the penal sum of $10,000.00 for the use and benefit of the Indians "conditioned for the payment of any and all damages which may accrue" by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, or their livestock (R. 6-7). It is further alleged that a bond was executed and delivered in comformity with the Act of Congress (R. 8-9). In that connection it is alleged, we believe erroneously, "that for the privilege of maintaining and operating said railroad trains, engines, and cars over, through and across said Fort Hall Reservation, and by reason of the provisions of said treaty agreement, and said Act of Congress," the defendants Oregon Short Line Railroad Company and Saint Paul-Mercury Indemnity Company executed the bond (R. 8), which bond bears date July 30, 1935 (R. 10). The Act of Congress of September 1, 1888, 25 Stat. L. 452, recites that the railroad had then been constructed and the treaty agreement merely provided for the payment of $8.00 per acre, without reference to any bond, and the bond was given merely by virtue of the provisions of Sec. 14 of the Act of September 1, 1888, which did not make the giving of such bond a condition precedent to the railroad company, or its successor,

operating their trains over the right of way which they had acquired for value received. The bond was merely to insure the payment of "damages which may accrue" subsequently —in this case subsequent to July 30, 1935 (R. 10).

It is next alleged that on January 19, 1938, at a point on the reservation where the Indians in question had a right to be, the Ford automobile in which they were riding was struck by a train of the Oregon Short Line Railroad Company, and four Indians killed (R.11-12). Nothing else concerning the circumstances of the collision is alleged. It is not alleged that the Railroad Company was guilty of any negligence. It is alleged in conclusion that by reason of the matters and things therein set forth there was due and owing from the defendants the sum of $10,000. No facts were alleged indicating the financial injury sustained by anyone further than that the funeral expenses involved amounted to approximately $2,500.00 (R. 12). It was alleged in Par. XIII of the complaint that all of the Indians killed or injured were members of the Shoshone and Bannock tribes residing on the Fort Hall Indian Reservation (R. 11), which was denied by the defendants (R. 31).

The answer of the defendants for a first defense challenged the sufficiency of the complaint to state a claim against the defendants upon which relief could be granted (R. 28); it then admitted the first seven paragraphs of the complaint, in which it was alleged that the Oregon Short Line Railroad Company was the successor in interest of the Utah and Northern Railway Company named in an Act of Congress, 25 Stat. L. 452, and that on July 3, 1868 the United States had made a treaty with the Shoshone and Bannock Indians creating a reservation; admitted that a report had been made to Congress of the tenor and effect of Exhibit "A" attached

to the complaint; admitted the making of a treaty between the United States and the Indians, and its ratification by Congress; admitted the execution of the bond pursuant to the Act of Congress, but not otherwise (R. 8, 30); admitted that by reason of said Act of Congress and said bond the defendants became obligated to pay such legal damages as might accrue to the Indians by reason of the killing or maiming of any of them (R. 30), but denied that the defendants by reason of said bond and the law applicable thereto had become liable or obligated to pay any sum on account of the killing or maiming of any Indian occurring without fault or negligence of the railroad company (R. 31); admitted that certain Indians were killed in a collision between a locomotive engine owned and operated by the Union Pacific Railroad Company upon said line of railroad and an automobile occupied by said Indians (R. 31); admitted that demand had been made upon the defendants to pay the sum of $10,000.00 and that they had refused (R. 32), and by way of separate defense alleged that the plaintiff, appellant herein, sought recovery solely upon the statute, 25 Stat. L. 452, and the bond given pursuant thereto; that the statute did not create a right of action for death of a human being, or provide any measure of damages, therefore, that the statute was merely one providing for the giving of a bond to secure the payment to the United States for the use and benefit of the Indians' damages which might lawfully accrue to them in consequence of the violation of their legal rights by the railroad company; that the bond was no broader than the statute, and that to render judgment in favor of the plaintiff and against the defendants would deprive the defendants, and each of them, of property without due process of law, con-

trary to and in violation of the provisions of the Fifth Amendment to the Constitution of the United States (R. 33).

The plaintiff, appellant herein, moved to strike from the answer of the defendants the third defense, and also moved the court for summary judgment upon the ground that the pleadings created no issue as to any material fact and that the moving party was entitled to judgment as a matter of law (R. 34-35). The minutes show that upon the argument counsel for the respective parties requested the court to consider and pass upon the sufficiency of the complaint (R. 36), and thereafter the court rendered its decision, in which (R. 36-43) it expressed the opinion that the statutes and the bond did not create an unconditional liability but concluded that damages did not accrue without the invasion of a legal right, that is, without negligence, and that accordingly the complaint did not state facts sufficient to constitute a cause of action, that the first defense set up in the answer should be sustained and the motions of the plaintiff to strike and for summary judgment should be denied, and it was so ordered (R. 43-44). The plaintiffs electing not to plead further but to stand on their complaint, and the time for pleading over having expired, judgment of dismissal was rendered (R. 45), from which this appeal is taken.

We feel that neither by the bare statement of the issues made by the pleadings, nor the statement contained in appellant's brief, can a clear and comprehensive picture be presented. We therefore undertake, as briefly as possible, to present in chronological order, within the limits of the record, the events which culminated in this suit.

On March 3, 1873 Congress passed an act, 17 Stat. L. 612,

20 Stat. 241, granting to the Utah and Northern Railroad Company a right of way over the public lands for the construction of a railroad from Utah northerly through the state of Idaho and into Montana, to connect with the Northern Pacific railroad. In the report, Exhibit "A" of the complaint, (R. 15), it is stated that the Utah & Northern Railway Company filed in the Department of the Interior a series of fifteen maps of different locations of its road, eleven of which were approved March 6, 1882, and that the other four, showing the line of the road through the Fort Hall Reservation, were disapproved March 27, 1882, for the reason that the law granting right of way through the public domain did not entitle it to go through the Indian Reservation, which was not public lands within the meaning of the Act, and further that the consent of the Indians had not been formally obtained and no compensation had been made to them. The grant contained no reservation with reference to public lands or Indian reservations, but the treaty with the Indians relinquished to them all title to the land within the reservation (R. 4), which constituted sufficient justification for the rejection of the maps in question. The general right of way act of March 3, 1875, 18 Stat. 482, by section 5, expressly excluded lands within the limits of an Indian reservation and other lands enumerated in section 5 of the act. It may be inferred that the Utah and Northern Railway Company thereupon appealed to Congress, whose settled policy it was "to encourage the settlement of lands in the territories, and the development of their vast natural resources" etc. (R. 20), for it appears from the report that a detailed history of the matter is set out in a message sent to Congress December 21, 1885 and printed as Ex. Doc. No. 20, 49th Congress First Session (R. 16). Thereupon Rob-

ert S. Gardner, United States Indian Inspector, and Peter Gallagher, United States Indian Agent, were specially detailed by the Secretary of the Interior to carry on negotiations with the Indians for their relinquishment to the United States of a right of way for the railroad company across the reservation, and for the relinquishment of approximately 1840 acres of land for the platting of a townsite (which was in fact Pocatello) 25 Stat. L. 452 (R. 16), and on May 27, 1887, an agreement was signed between the above representatives of the Government and the Indians, which is recited in 25 Stat. 452, and which appears in Appendix "1" hereto. The agreement, so far as the railroad company was concerned, merely consented and agreed to the relinquishment of a right of way 200 feet wide with additional lands for station grounds in consideration of the payment to the Secretary of the Interior for their use and benefit of the sum of $8.00 per acre. No reference to a bond of any kind, nor of liability for damages, appears in the agreement, and the price of $8.00 per acre was apparently agreed upon as fair compensation for the reason that the Oregon Short Line Rail*way* Company had paid to them $7.77 per acre for 772 acres of right of way (R. 15). The Act of September 1, 1888, 25 Stat. 452, recited this agreement with the Indians, and after numerous provisions, not necessary here to be noted, provided by Section 11 as follows:

> "That there be, and is hereby, granted to the Utah and Northern Railway Company a right of way not exceeding 200 feet in width," etc.

By Section 14 of the Act of Congress it was provided, but not because of any agreement with the Indians, that the railway

company should execute a bond to the United States conditioned for the

> "due payment of any and all *damages which may accrue* by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, or their livestock, in the construction or operation of said railway, or by reason of fires originating thereby; the *damages* in all cases, in the event of failure by the railway company to effect an amicable settlement with the parties in interest, to be recovered in any court of the Territory of Idaho," etc. (See Appendix "1").

It seems to us therefore inaccurate to say, as is done at page 10 of the appellant's brief, that the "Indians bargained for a bond in the amount of $10,000," or that "the United States *and* the Indians sought and the railroad understood that it was to assume a larger responsibility" (p. 10) or that "* * the United States *and* the Indians made an agreement to grant" (p. 10). All that the Indians bargained or agreed for was a price per acre somewhat in excess of that which they had previously received from another company (R. 15); and that agreement of relinquishment was as "solemn" as the agreement creating the Indian reservation (R. 4, 7). By the agreement to pay $8.00 per acre for the right of way the red man's "dread of the approach of the white man's commerce" and of the "locomotive and/or iron horse," assumed by the appellant (R. 5) was fully overcome, without the requirement by them of a bond, to the great satisfaction of the United States, and the Committee of Indian Affairs (R. 19), and to Congress, who accepted the recommendations of the report, from which report it appears that the advent of the locomotive, operated on a line of railroad, extending easterly

and westerly through Pocatello, by another company, and the advent of the white man were already independently accomplished facts (R. 16, 17).

ARGUMENT

I.

Neither the statute nor the bond created a new right—they simply provide security for the payment of legal damages which might accrue.

Nowhere, either in the treaty or in the act of Congress, is there any express statement that the liability of the railroad company for death of an Indian or injury to his property shall be different or greater than that imposed by law as administered by the courts of the United States or of the state of Idaho. Under the law as so administered liability did not result from the mere killing or maiming without negligence, of a human being, which is all we are considering in this instance, and appellant has not referred us to any statute or decision to the contrary. In no case did such liability arise without fault or negligence on the part of the person charged, consequently there could be no "damages which may accrue," or otherwise stated, damages could not accrue from the mere circumstance of the injury without fault, as indicated in the opinion of the District Judge (R.36-42), and the courts will not assume an intention on the part of the legislature, or of congress, to create a new right or an absolute or unconditional liability where none existed before, unless it very clearly appears from the language employed that they intended to do so.

Globe and Rutgers Fire Insurance Co., vs. Draper, 66 Fed. (2d) 985, 991;

T. & P. R. Co., vs. Abilene Cotton Oil Co., 204 U. S. 426, 436, 437.

"The intention of Congress is to be sought for primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture. Gardner vs. Collins, 2 Pet. 58, 93; United States vs. Goldenberg, 168 U. S. 95."

Thompson vs. United States, 246 U. S. 547, 62 L. Ed. 876.

The language to be construed is that portion of Section 14 of the Act which requires the railroad company to furnish a bond for the use and benefit of the Indians:

"conditioned for the due payment of any and all *damages* which may *accrue* * * *, the *damages* in all cases, in the event of failure by the railway company to effect an amicable settlement with the parties in interest, to be recovered in any court of the Territory of Idaho having jurisdiction of the amount claimed."

The complaint appears originally to have been drafted upon the theory that the defendants were by virtue of the statute and the bond obligated unconditionally to pay $10,000.00, the full amount of the bond, because of the death of the Indians, for after alleging the death of the Indians and a refusal of the defendants to make an amicable settlement and "pay the obligations incurred by said defendants under said bond and act of Congress," and alleging that the funeral expenses amounted to $2,500.00, it is averred:

"That by reason of the matters and things herein

> alleged and set forth there is due, owing and unpaid from the defendants to the plaintiff for the use and benefit of the Shoshone and Bannock tribes of Indians and the parties in interest the sum of $10,000.00" (R.12)

After alleging such amount to be due by virtue of the matters above recited, it was added that the Shoshone and Bannock tribes of Indians and their heirs, representatives and parties in interest of the deceased persons had been damaged in excess of $10,000.00.

The contention of the appellant on this point was clearly untenable however, because, if it were otherwise, they could have come into court and demanded $10,000.00 for the killing of a calf or the starting of an inconsequential fire (R.9).

It is not certain whether this theory was abandoned before or after the rendition of the decision appealed from, because the defendants, by their answer to paragraph XIV (R.12) put in issue the fact as to whether the burial expenses amounted to $2,500.00, or any sum in excess of $500.00, and denied all of the averments of paragraph XIV, except the demand by the plaintiff of $10,000.00 and the refusal of the defendants to pay or agree upon settlement, and thereafter the appellant moved for summary judgment (R.34). By the brief it now appears that the appellant's contention is narrowed to the question of whether the plaintiff was entitled to recover $10,000.00, or some other sum, upon mere proof of the death of the Indians in the crossing collision, without evidence as to whether the railroad company was negligent or whether the death of the Indians was due to unavoidable accident or whether the proximate cause of their death was any act of

the railroad company, either with or without fault. The portion of the opinion dealing with this latter phase of the question appears at page 40 of the transcript and is assigned as a reason for the holding of the court which has been appealed from.

For the purpose of determining the intent of this statute it is necessary to consider the meaning of two words in their commonly accepted sense, unless for some very cogent reason it appears that there was a contrary intention on the part of Congress or the defendant railroad company and its bondsman.

Cumberland Tel. Co. vs. Kelly, 160 Fed. 316;

Old Colony R. Co., vs. Commissioners, 284 U. S. 552, 560, 76 L. Ed. 484.

"Damages"

The word "damages" is a noun; it is used to express the compensation awarded by the law for the violation of a legal right.

> " 'Damages' is the sum of money which the law awards or imposes as pecuniary compensation, recompense or satisfaction for an injury done or a *wrong* sustained as a consequence either of a breach of a contractual obligation or tortious act."
>
> 15 Am. Juris. 387, Sec. 2 "Damages," citing U. S. Steel Prod. Co., vs. Adams, 275 U. S. 388, 72 L. Ed. 326.

"Damages sustained are to be regarded as the result of a wrongful act."

Tetzner vs. Naughton, 12 Ill. Ap. 148, 153.

"Damages have been defined to be the compensation which the law will award for injury done."

Scott vs. Donald, 165 U. S. 58, 86.

"Damages are the pecuniary consequence which the law imposes for the breach of some duty or violation of some right."

Dean vs. Williamette Bridge Co., (Ore.) 29 Pac. 440, 442.

"Accrue"

When a legal right has been violated damages accrue.
United States of America vs. Oregon Short Line Railroad Company, et al (R.38-39).

What the appellant actually asserts, we believe, upon the facts alleged, is that someone has been damaged (a verb), but, as indicated by the District Judge, such a situation may have come about without any fault or negligence on the part of the railroad company or without its act even being a proximate cause of the injury (R.40). The negligence of those operating the automobile may have been the sole proximate cause, or it may have been an unavoidable accident. It is not suggested by the appellant that a right of action for death without negligence existed in the State of Idaho at the time of the passage of the act. Such a right of action did exist where death was caused by wrongful act.

"When the death of a person, not being a minor,

> is caused by the *wrongful act or neglect* of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."
>
> Idaho Code of Civil Procedure, 1881, Sec. 192.
>
> See: Section 5-311 I. C. A. 1932.

Without this provision there would have been no right of action for death in the State of Idaho. With such provision in the statutes of the State of Idaho at the time of the enactment by Congress of a law providing for the recovery of damages for death the natural intendment would be that the provision meant such damages as might accrue within the forum where the death occurred and where there existed some guide to the grounds of liability and measure of damages. In the absence of such a guide, how could it be said what damages might accrue? Especially, how could this be said when no damages accrued within such forum except as a result of a wrongful act?

> "According to Webster's and Bouvier's definitions of 'accrue', it is sufficiently accurate to say that when the two elements constituting a cause of action, viz., a right possessed by the plaintiff on the one hand, and the infringement thereof or *delict* of the defendants on the other, both coexist—(arise, happen or come to pass)—they are combined and a cause of action accrues at that moment."

Bennett vs. Thorne, (Wash.) 78 Pac. 936, 940, 68 L. R. A. 113.

See also: National Lead Company vs. City of New York, 43 Fed. (2d) 914, 916;

Ercanbrack vs. Faris (Ida.) 79 Pac. 817, 819.

As was suggested by the District Judge, and also by this Court in Liebes vs. Commissioner of Internal Revenue, 90 Fed. (2d) 932, 936, there is a close analogy between the expressions "damages which may accrue" and "damages which may become due". This reasoning is also well supported by the authorities above cited.

An amount *due,* in the primary sense, means "owing."

United States vs. Bank of North Carolina, 8 L. Ed. 308, 31 U. S. (Pet.) 29, *36*;

Sather Banking Company vs. Briggs Company, 72 Pac. 352, 355;

Smith vs. Miller, (S. D.) 237 N. W. 827, 831.

Griffith et al., vs. Speaks, et al, 63 S. W. 465, was a suit on a bond given to release the levy of a distress warrant. The plaintiffs moved for judgment on the bond, and the defendants filed their answer resisting judgment upon the ground that they were not indebted to the appellant for the amount claimed, or for any sum for the keep of one mare. A general demurrer to the answer was sustained, and in reversing the Supreme Court of Missouri said:

"It is contended by counsel for the appellant that,

> after appellants executed the bond under section 653 of the Civil Code of Practice, they were limited by section 654 to the grounds of defense that the debt for which the agister's warrant was sued out had not matured or become due, or that it was levied upon exempt property; that the word 'due' in section 654 referred only to the maturity of the rent. We cannot believe that the legislature intended to put any such restricted meaning upon the word as used in this section of the Code. The word 'due', in its ordinary sense, means 'that which is justly owed; that which law or justice required to be paid or done'."

At pages 8 and 9 of appellant's brief the decision of this court, Liebes & Co., vs. Commissioner of Internal Revenue, 90 Fed. (2d) 932, 936, is quoted very briefly on the point of when a cause of action accrues. In that opinion immediately after the following words quoted in appellant's brief:

> "As a general statement, the word 'arose' seems most expressive."

appears the following:

> "However, such a general definition must be considered in connection with the use of the word. We must, therefore, determine what is meant by the words 'income accrued' as used with reference to income tax returns,"

following which the court cites a number of decisions of the United States Supreme Court to the effect that such a contingency comes into existence upon the development of an "unconditional liability" a "claim of right", "when the right to receive an amount becomes fixed, the right accrues", "when

the liability is uncontested and certain". Therefore, as was stated by the District Court (R. 39) damages did not accrue from the mere circumstance of the death of the Indians in a crossing collision and without regard to the rules of decisions by which the expressions "damages" and "accrue" were commonly understood in law.

We have been cited to no decision which holds that the rules of statutory construction which were applied by Judge Cavanah in this case should be or ever have been overruled out of solicitude for the Indians on the theory that, irrespective of the language employed or the legal effect of the words used, Congress must have intended (appellant's brief p. 6) to create an innovation or enlargement upon existing law. None of the decisions cited by the appellant support such a contention.

The first authority cited by the appellant on this point is Alaska Pacific Fisheries vs. United States, 248 U. S. 78, and the second one is Choate vs. Trapp, 224 U. S. 665. The decisions, it will be observed, are cited in the inverse order of their rendition. Analyzing them in the order of their rendition we find that Choate vs. Trapp involved a contention by 8,000 Choctaw and Chickasaw Indians who held land in Oklahoma under grants which contained provisions "that the lands should be nontaxable" for a limited time. After the issuance of the patents to the Indians Congress passed a general act removing restrictions against sale of the land by the Indians and providing that in such event the tax exemption should cease to exist, whereupon the state of Oklahoma undertook to tax the lands, and, based upon the statutes of the United States and treaties which expressly provided that each member of the tribe should have alloted to him a share of the land, all of

which, "shall be non-taxable while the title remains in the original allottee," and that the patents issued to such allottees "should be framed in conformity with the provisions of the agreement," the court held on the plain language of the patents and the statutes that the land was not subject to taxation by the State of Oklahoma. There the court, contrasting tax exemption granted by states where the state received nothing and the beneficiaries of the exemption gave nothing for the provision of the law allowing such exemptions, said:

> "There was no consideration moving from one to the other. Such exemption was a mere bounty, valuable as long as the state chose to concede it, but as tax exemptions are strictly construed, it could be withdrawn at any time the state saw fit.
>
> "But in the *government's* dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the *United States,* are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. * * * *"

The language as applied to the facts of that case was appropriate, and upon the facts of the case there could be no question but what the court was fully warranted in arriving at the conclusion that under the language employed the tax exemption should be sustained.

Alaska Pacific Fisheries vs. United States, supra, was another case involving the interpretation of statutes as between

the United States and the Indians, and involved the fishing rights of Indians in Alaska, and, upon the considerations expressed in the opinion, which seemed amply to warrant the conclusion arrived at, the court cited the case of Choate vs. Trapp, supra, as a rule of law construing doubtful expressions as between the United States and the Indians.

We fail to see how either of those decisions, or the rule therein announced, may be of service in an attempt to reverse the opinion of the lower court herein, for in the application of the rule to the facts of the two foregoing cases the decisions were amply justified, and it was not stated in those decisions, or any others that have come to our attention, that the rule therein announced is in conflict with or should override any rule upon which the decision of the district court was rested.

The argument of the appellant in this connection (p. 9) is based upon a composite or build-up of the rule governing interpretation of treaties and agreements between the United States and the Indians, and the following further premises, which we do not think are warranted by the facts of the opinion of the lower court. It is asserted that the district court approached the question at issue as if only a general statute regulating railroad liability was involved (p. 9), and that assertion is followed with a citation of Castril vs. Union Pacific Railroad Company, 2 Ida. 576, 21 Pac. 416, wherein it was held that a statute creating absolute liability for the killing of livestock without fault or negligence on the part of the railroad company was unconstitutional. Judge Cavanah's opinion did not proceed primarily upon the basis of this decision but proceeded upon giving to the language employed in the statute and the bond the normal and usual interpretation applied by the courts upon the principle that—

> "If the language used expresses the intention, reasonably intelligent and plain, the court must accept it without modification by resorting to conjecture or construction. Congress must be presumed to use words in their ordinary and known signification; Thompson v. U. S. 246 U. S. 547; Old Colony R. Co., vs. Comm's 284 U. S. 552-560." (R. 39).

We are unable to find any citation of relevant authority in appellant's brief which indicates that this rule is inapplicable or that it was improperly applied in the facts of the case. If we correctly understand appellant's argument, it is that according to the report to Congress it was stated that provision had been made for indemnification by the railroad company to the Indians for the killing or maiming of Indians or their livestock, and that the committed believed that every interests of the Indians had been jealously guarded and protected.

The giving of the bond constituted a provision for indemnification of the Indians and assured to them a solvent creditor for the payment of damages which might lawfully accrue to them in consequence of the invasion of their rights, whereas, without the bond the Indians would have had to rely for the settlement of an agreed liability or the collection of a judgment upon the solvency of a railroad company pioneering in the '80's in an undeveloped country. This, together with the $8.00 per acre which the railroad company was to pay for the right of way, was ample justification for the assertion by the committee that the rights of the Indians had been jealously guarded.

The use in the report of the expression "indemnification" must be determined by reference to the statute and the bond given by the railroad company and accepted by the Govern-

ment. The reasonable import of that word is consistent with the finding of the lower court.

> Allen vs. Aetna Life Insurance Co., 76 CCA 265, 145 Fed. 881;
>
> Henderson Light & Power Co., vs. Maryland Casualty Co., (N. C.) 69 S. E. 234, 30 L.R.A.N.S. 1005;
>
> Frye vs. Bath Gas & Electric Co., 97 Maine 241, 59 L. R. A. 444.

There can be no indemnification where there is not legal liability, and the ultimate interpretation of the expression "indemnification" falls back upon the language of the statute and the bond, "damages which may accrue."

At page 9 of the appellant's brief we read:

> "It (the opinion) stated that the statute should be strictly construed as it was in derogation of common law (R. 41)."

That the court did not so state nor apply such a rule is apparent from the record and the decisions cited in support of the reasons assigned by the court; what he said was:

> "The statute will not be construed as taking away a common law right unless such common law right is by express words, embodied in the statute, and courts will be reluctant to construe such a statute in derogation of the common law. Globe & Rutgers Fire Insurance Company vs. Draper (9th C) 66 Fed. (2) 985." (R. 41).

This rule does not appear to be challenged by the appellant

but in place thereof they set up for challenge a different proposition, which the record does not support.

Finally the suggestion is made in the Government's brief that the act of congress in question is a grant and that grants by the United States are to be strictly construed against the grantee, citing Hannibal, etc., Railroad Company vs. Missouri River Packet Company, 125 U. S. 260 (p. 9-10) and that the agreement for the bond is merely an extension of the grant. The decision relied upon is not analogous nor in point. It dealt with a grant or privilege with no consideration being given therefor, and no contractual obligation. In the case at bar the rights of the railroad company do not rest primarily upon a grant but are based upon an express agreement of the Indians ratified by Congress, and the subsequent provision in the act for the giving of a bond is no part of the agreement and no part of the grant. See Appendix "1". The Act recites that the agreement "is hereby accepted, ratified and confirmed"; the agreement there referred to recites:

> "The Shoshone and Bannock Indians, parties hereto, do hereby consent and agree that upon payment to the Secretary of the Interior for their use and benefit of the sum of $8.00 for or in respect of each and every acre of land of the said reservation taken and used for the purpose of its said railroad, the said Utah and Northern Railroad Company *shall have and be entitled to* a right of way not exceeding 200 feet in width," etc.

The land was thereby transfered or conveyed by the Indians, subject to ratification by Congress, by as "solemn" an agreement as the one so characterized in the complaint, by which the reservation was created (R. 4) ; and the ratification thereof

by Congress was not in any proper sense a grant, but was in the nature of a quit-claim or trustees conveyance. Therefore the rule of construction of government grants, either gratis or otherwise, as applied in suits to which the Government is a party has no application to this case. The discussion and authorities appearing at pages 11 and 12 deal only with a question of *power* and not with statutory interpretation and, as will hereafter appear, the cases cited do not support the appellants' contention. The discussion appearing at pages 13 and 14 of the brief seeks to establish an interpretation of the statute in issue by reference to another statute granting a railroad right of way which in turn appears never to have had judicial interpretation. If either of the statutes in question had been judicially interpreted it is a reasonable assumption that the appellant would cite such decision or decisions. In the absence of such a showing it is somewhat remarkable that the appellant should now be contending for such a harsh and untenable construction after a lapse of 52 years since the enactment of the statute.

A further matter of curiosity, which the District Court deemed worthy of consideration and weight, is that portion of Section 14 of the act, which reads as follows:

> "the damages in all cases, in the event of failure by the railway company to effect amicable settlement with the parties in interest, to be recovered in any court of the Territory of Idaho having jurisdiction of the amount claimed," etc.

We quote from the opinion as follows:

> "The expression in the statute, 'in the event of failure by the railway company to effect an amicable settle-

> ment with the parties in interest' clearly indicates that Congress intended the railroad company and the parties had the right to consider how the injury occurred and not that the plaintiff could assert unconditional liability." (R. 41-42).

Also, we may inquire, What was the purpose of the provision contained in Section 13 of the act, to the effect:

> "that said railway company shall fence and keep fenced, all such portions of its road as may run through any improved lands of the Indians,"

if the railroad company was to be liable in any event for all animals killed irrespective of fault or negligence on its part?

II.

The imposition of liability, regardless of fault, under the statute in question, would be an unconstitutional interpretation, which defense the appellees are not estopped from asserting.

The appellees are not estopped.

The appellant's argument on this point assumes the correctness of its previous argument, and the foreclosure of the appellees to question it, as a necessary premise to appellant's asserting estoppel. The rule supported by the decisions cited by the appellant applies only where the language of the statute is sufficiently clear that it can be said that the party challenging the constitutionality of the statute knew when he accepted the benefits of the statute that he was submitting to the interpretation contended for by his opponent, otherwise there could be no element of estoppel. If the appellant were

able to show by the record such an interpretation of the statute as is now made by it prior to the acceptance of the grant by the railroad company its position concerning the question of estoppel might be tenable. In the present condition of the record its position on this point is untenable.

International Steel & Iron Co., vs. National Surety Co., 297 U. S. 657, 665, 80 L. Ed. 961, 966;

Abie State Bank vs. Bryan, 282 U. S. 765, 776, 75 L. Ed. 690, 703.

III.

The imposition of unconditional liability is unconstitutional

Appellant's authorities on this point are cited at pages 11, 12 and 16 of their brief. All of those decisions are based upon different principles than those involved in the present situation, which do not have to be here discussed as they are fully distinguished in a note which covers the case to date in 53 A.L.R. 879-881. In that note, which begins at page 875 and extends to 884, inclusive, it will be found that absolute liability for damage by fire rests upon a different basis.

St. L. & S. F. Co., vs. Mathews, 165 U. S. 1, which creates an absolute liability for damage caused by fire was based upon the common law duty of one to control his own fires. That distinction applies to Martin vs. N. Y. & N. E. R. Co., quoted at page 12 of appellant's brief.

Missouri Pacific Ry. Co., vs. Humes, 115 U. S. 512, cited at page 11 of appellant's brief, was a case imposing a penalty for failure to fence.

All of the other cases cited by appellant in that connection are distinguished in the foregoing note to 53 A.L.R.

CONCLUSION

It is submitted, first, that the statute does not purport to, and does not, impose an absolute or unconditional liability, regardless of fault or negligence, for the killing of Indians or their livestock; secondly, that the appellees are not estopped to contest the contention of the appellant in that respect, and thirdly, that if it shall be held that it was the intention or declared purpose of the act to create liability for the death of an Indian without fault or negligence on the part of the railroad company, the statute is, to that extent, unconstitutional and violates the rights secured to the appellees under the Fifth Amendment to the Constitution of the United States.

Respectfully,

GEO. H. SMITH

Salt Lake City, Utah

H. B. THOMPSON

L. H. ANDERSON

Pocatello, Idaho.

Attorneys for Appellees.

APPENDIX "1"

From 25 Stat. L. 452

AN ACT to accept and ratify an agreement made with the Shoshone and Bannock Indians, for the surrender and relinquishment to the United States of a portion of the Fort Hall Reservation, in the Territory of Idaho, for the purposes of a town-site, and for the grant of a right of way through said reservation to the Utah and Northern Railway Company, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a certain agreement made and entered into by the United States of America represented as therein mentioned, with the Shoshone and Bannock Indians resident in the Fort Hall Reservation in the Territory of Idaho, and now on file in the office of Indian Affairs, be, and the same is hereby, accepted, ratified, and confirmed. Said agreement is executed by a duly certified majority of all the adult male Indians of the Shoshone and Bannock tribes occupying or interested in the lands therein more particularly described, in conformity with the provisions of article eleven of the treaty concluded with said Indians July third, eighteen hundred and sixty-eight (Statutes at Large, volume fifteen, page six hundred and seventy-three), and is in the words and figures following, namely:

"Memorandum of an agreement made and entered into by the United States of America, represented by Robert S. Gardner, U. S. Indian Inspector, and Peter Gallagher, U. S. Indian Agent, specially detailed by the Secretary of the Interior for this purpose, and the Shoshone and Bannock tribes of Indians, occupying the Fort Hall Reservation in the Territory of Idaho, as follows:

ART. I. The said Indians agree to surrender and relinquish to the United States all their estate, right, title and interest in and to so much of the Fort Hall Reservation as is comprised within the following boundaries ,that is to say: and comprising the following lands, all in town six (6) south of range thirty-four (34) East of Boise Meridian.

West one-half section twenty-five (25); all of section twenty-six (26); east one-half section twenty-seven (27); northwest quarter section thirty-six (36); north one-half section thirty-five (35); northeast quarter of southwest quarter section thirty-five (35); northeast quarter of the northeast quarter of section thirty-four (34); comprising an area of eighteen hundred and forty (1840) acres, more or less, saving and excepting so much of the above-mentioned tracts as has been heretofore and is hereby relinquished to the United States for the use of the Utah and Northern and Oregon Short Line Railways.

The land so relinquished to be surveyed (if it shall be found necessary) by the United States and laid off into lots and blocks, as a townsite, and after due appraisement thereof, to be sold at public auction to the highest bidder, at such time, in such manner and upon such terms and conditions as Congress may direct.

The funds arising from the sale of said lands, after deducting the expenses of survey, appraisement, and sale, to be deposited in the Treasury of the United States to the credit of the said Indians, and to bear interest at the rate of five per centum per annum; with power in the Secretary of the Interior to expend all or any part of the principal and accrued interest thereof, for the benefit and support of said Indians in such manner and at such times as he shall see fit.

Or said lands so relinquished to be disposed of for the benefit of said Indians in such other manner as Congress may direct; and

Whereas, in or about the year 1878 the Utah and Northern Railroad Company constructed a line of railroad running north and south through the Fort Hall Reservation, and has since operated the same, without payment, of any compensation whatever to the said Indians, for or in respect of the lands taken for right of way and station purposes; and

Whereas the treaty between the United States and the Shoshone and Bannock Indians, concluded July 3, 1868 (15 Stat. at Large, page 673) under which the Fort Hall Reservation was established, contains no provisions for the building of railroads through said reservation: Now, therefore,

ART. II. The Shoshone and Bannock Indians, parties hereto, do hereby consent and agree that upon payment to the Secretary of the Interior for their use and benefit of the sum of ($8.00) eight dollars for or in respect of each and every acre of land of the said reservation, taken and used for the purposes of its said railroad, the said Utah and Northern Railroad Company shall have and be entitled to a right of way not exceeding two hundred (200) feet in width, through said reservation extending from Blackfoot River, the northern boundary of said reservation, to the southern boundary thereof, together with necessary grounds for station and water purposes according to maps and plats of definite location, to be hereafter filed by said company with the Secretary of the Interior, and to be approved by him, the said Indians, parties hereto, for themselves and for the members of their respective tribes, hereby promising and agreeing to, at all times hereafter

during their occupancy of said reservation, protect the said Utah and Northern Railroad Company, its successors or assigns, in the quiet enjoyment of said right of way and appurtenances and in the peaceful operation of its road through the reservation.

ART. III. All unexecuted provisions of existing treaties between the United States and the said Indians not affected by this agreement to remain in full force; and this agreement to take effect only upon ratification hereof by Congress.

"Signed at the Fort Hall Agency, in the Territory of Idaho, by the said Robert S. Gardner and Peter Gallagher on behalf of the United States, and by the undersigned chiefs, headmen, and heads of families and individual members of the Shoshone and Bannock tribes of Indians, constituting a clear majority of all the adult male Indians of said tribes occupying or interested in the lands of the Fort Hall Reservation in conformity with article eleven of the treaty of July 3, 1868, this twenty-seventh (27) day of May, A. D., one thousand eight hundred and eighty-seven (1887)."

(Here follow the signatures.)

* * * * *

SEC. 11. That there be, and is hereby, granted to the said Utah and Northern Railway Company a right of way not exceeding two hundred feet in width (except such portion of the road where the Utah and Northern and the Oregon Short Line Railways run over the same or adjoining tracks, and then only one hundred feet in width) through the lands above described, and through the remaining lands of the Fort Hall Reservation, extending from Blackfoot River, the northern boundary of said reservation, to the southern boundary thereof;